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(31,534)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 811

GONG LUM AND CHEW HOW, NEXT FRIEND FOR MARTHA LUM, PLAINTIFFS IN ERROR,

vs.

G. P. RICE, L. C. BROWN, HENRY McGOWAN, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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[fol. 3]

IN CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF BOLIVAR COUNTY, MISSISSIPPI

PETITION FOR WRIT OF MANDAMUS—Filed September 29, 1924

To the Honorable Wm. A. Alcorn, Judge of the Eleventh Circuit Court, District of the State of Mississippi, sitting in and for the First Judicial District of Bolivar County, Mississippi:

Your petitioners, Gong Lum, an adult, and Martha Lum, a minor, by her next friend Chew How, an adult, come and complain of Mr. J. H. Nutt, Mr. G. P. Rice, Mr. L. C. Brown, Mr. Henry McGowan and Mr. W. F. Bond, State Superintendent of Education of the State of Mississippi, and charge the facts to be:

That Gong Lum is a resident of the First District of Bolivar County, Mississippi and resides in the Rosedale Consolidated High School District; that your petitioner, Martha Lum, is a native born citizen of the United States and that her parents were residents of the United States and the State of Mississippi, engaged in the mercantile business, and not directly or indirectly connected with the consular service, or any other service, of the government of China or any other government, at the time of her birth; that she is nine years old, having been born January 21, 1915, and she sues by her next friend, Chew How, who is a native born citizen of the United States and the State of Mississippi, and they charge that she, the said Martha Lum, is of good moral character and is a good, clean, moral girl between the ages of five and twenty-one years and a native born citizen of the United States and the State of Mississippi, and a resident citizen of the Rosedale Consolidated High School District in Bolivar County, Mississippi, and that as such citizen and educable child it becomes her father's duty under the law to send her to school. And that [fol. 4] she is an educable child of the said district and desires to attend the Rosedale Consolidated High School, and

at the opening of said school she appeared as a pupil but at the noon recess was notified by the superintendent, Mr. J. H. Nutt, in charge of the school that she would have to return to her home and would not be allowed to return to the school. That an order had been issued by the Board of Trustees, composed of G. O. Rice, L. C. Brown and Mr. Henry McGowan, excluding her from attending said school, solely on the ground and for the reason that she was of Chinese descent and, therefore, not a member of the white or Caucasian race, and that said order had been made in obedience to the instructions of W. F. Bond, State Superintendent of Education of the State of Mississippi.

Your petitioners would further show to this Honorable Court, that there is no school maintained in the district for the education of children of Chinese descent and none established in said district or county where she could attend.

Your petitioners would further charge, that the constitution of the State of Mississippi requires that there shall be a County common school fund, which shall consist of poll taxes to be retained in the counties where the same is collected, and a State common school fund to be taken from the general fund in the State treasury, which together shall be sufficient to maintain a common school for a term of four months in each scholastic year, but any county or separate school district may levy an additional tax to maintain schools for a longer time than a term of four months, and that the said common school fund shall be distributed among the several counties and separate school districts in proportion to the number of educable children in each, to be collected from the data in the office of the State Superintendent of Education in the manner prescribed by law, and the constitution also requires that it shall be the duty of the legislature to encourage by all suitable means the promotion of [fol. 5] intellectual, scientific, moral and agricultural improvement, by establishing a uniform system of free public schools by taxation or otherwise, for all children between the ages of five and twenty-one years, and as soon as practicable to establish schools of the higher grade, and in obedience to this mandate of the constitution, the legislature has provided by law for the establishment and for the payment of the expenses of the Rosedale Consolidated High School, and petitioner's father is a tax payer and helps

support and maintain said school and she, as an educable child between five and twenty one years and a resident within said district, is entitled to attend said school as a pupil, and it is made the duty of her father to send her to school and that this is the only school conducted in said district available for her as a pupil; that the right to attend said school is a valuable right; that she is not a member of the colored race nor is she of mixed blood, but she is of pure Chinese origin or descent and a native born citizen of the United States and the State of Mississippi and of the Rosedale Consolidated High School Distruct, and, is therefore, an educable child between the ages of five and twenty-one years in every way competent and qualified to attend said school, and has a right to attend said public school and said right is a valuable right, and that she is advised that notification had been issued by Mr. W. F. Bond, State Superintendent of Education of the State of Mississippi, to the superintendent, Mr. J. H. Nutt, and to the Board of Trustees, whose names are above set forth, to deny her this right solely and exclusively on the ground that she is of Chinese descent, and she is therefore discriminated against directly and denied the valuable right and privilege which she is entitled to, as a citizen of the State of Mississippi, on account of her race, and that the State of Mississippi, by its duly constituted Superintendent of Education and by [fol. 6] its Superintendent of the Rosedale Consolidated High School and by the Trustees of said consolidated high school, is denying to her, a native born resident citizen of the United States and the State of Mississippi, the privileges and immunities of her citizenship; and that the right to attend said Rosedale Consolidated High School is a valuable right and a valuable opportunity to her, and that she is being deprived thereof without the process of law, and that on account of her race or descent she is being denied the equal protection of the law, and contrary to the provisions of the constitution of the United States and the constitution and laws of the State of Mississippi. That the said state Superintendent of Education, superintendent of the Rosedale Consolidated High School and Trustees of the Rosedale Consolidated High School have been requested to permit the said Martha Lum to attend said public school in the said district in which she resides and wherein she is an

educable child and citizen of the United States, as aforesaid, and not a member of the colored race or of any mixed colored blood, but that the said school authorities have denied to her this valuable right and privilege solely and exclusively on the ground and for the reason that she is of Chinese origin and descent. That the said school authorities have no discretion under the law as to the admission of the said Martha Lum as a pupil of the school aforesaid but that they continue without authority of the law to deny her the right to attend the said school as a pupil thereof.

That your petitioners are entitled to have a writ of mandamus issued from this Court commanding the defendants and each of them to admit the said Martha Lum into the said school as a pupil and to desist from discriminating against her on account of her race or ancestry, and to accord to her the same rights and privileges accorded to other educable children between the ages of 5 and 21 years residing [fol. 7] in the said Rosedale Consolidated High School district. And in petitioning for said writ of mandamus your petitioners allege that they have no other plain, adequate and complete remedy in the premises.

Wherefore premises considered, your petitioners pray that process be issued to each of the said defendants commanding them to be and appear before the Circuit Court of the First Judicial District of Bolivar County, Mississippi, on the Third Monday in October, 1924, then and there to plead, answer or demur to the allegations of this petition and to show cause, if any they have, as to why the writ of mandamus should not be issued to them by the Court as hereinbefore prayed for in this petition, commanding them to admit the said Martha Lum as a pupil of the school aforesaid, and as a duty enjoined upon them by virtue of their offices under the constitution of the United States and of the constitution and laws of the State of Mississippi.

That the said J. J. Nutt, G. P. Rice, L. C. Brown and Henry McGowan, are resident citizens of the First Judicial District of Bolivar County, Mississippi, and that W. F. Bond, State Superintendent of Education, is a resident citizen of Hinds County, Mississippi.

Your petitioners further pray that the defendants be taxed with all costs in this behalf expended. And as in duty bound will ever pray, etc.

Gong Lum, Martha Lum, by her next friend, Chew How, Petitioners.

[File endorsement omitted.]

[fol. 8] In Circuit Court of Bolivar County

Gong Lum et al.

vs.

G. P. Rice et al.

Order Setting Cause

This cause this day coming on to be heard, and it appearing to the court that counsel representing the petitioners and defendants in the above cause have agreed that said cause may be tried in vacation as in term time, on the 5th day of November, 1924, or at such later date as W. A. Alcorn, Jr., Judge of this court may name and that it may be tried at such place as may be convenient to said Judge:

Therefore, the above cause is hereby taken under advisement to be tried by W. A. Alcorn, Jr., Judge of this Court, on the 5th day of November, 1924, at such place as will suit the convenience of said Judge, at nine o'clock A. M. on said date, and if it is not convenient for said judge to hear said cause on said date, then said cause shall be heard on such other date as soon thereafter and at such place as said Judge may designate. The said cause shall be tried in vacation as in term time and such orders and judgments shall be entered therein in vacation as could be entered in term time.

Ordered, adjudged and decreed on this 28th day of October, 1924.

[fol. 9] In Circuit Court of Bolivar County

Demurrer to Petition for Mandamus—Filed November 1, 1924

To the Honorable Wm. A. Alcorn, Judge of the Eleventh Circuit Court District of the State of Mississippi, sitting in and for the First Judicial District of Bolivar County, Mississippi:

The Demurrer of J. H. Nutt, G. P. Rice, L. C. Brown, Mr. B. McGowan, and W. F. Bond, State Superintendent of Education of the State of Mississippi, to the bill exhibited against them by Gong Lum et al.

The said defendants demur to said bill and pray the judgment of the court if they should make further answer thereto; and they show the following cause of demurrer to said bill, to-wit:

First. There is no equity in the bill.

Second. Said bill states no cause of action.

Third. The relief prayed for in said bill is contrary to the statutes and violative of the constitution of the State of Mississippi.

Fourth. This court is without jurisdiction to try said cause.

Fifth. Complainant has a full, complete and adequate remedy at law.

Sixth. The bill shows on its face that complainant is a member of the Mongolian, or yellow race, and therefore, not entitled to attend the schools provided by law in the State of Mississippi for children of the white, or Caucasian race, and for other good and sufficient reasons.

Rush H. Knox, Attorney General, by E. C. Sharp, Asst. Attorney General.

[fol. 10] I, E. C. Sharp, Attorney at Law, hereby certify that I have read the above and foregoing demurrer and

believe that the grounds of demurrer stated therein are well taken and that said demurrer should be sustained.

This the 29th day of October, 1924.

E. C. Sharp, Attorney.

[File endorsement omitted.]

IN CIRCUIT COURT OF BOLIVAR COUNTY

[Title omitted]

ORDER OVERRULING DEMURRER AND ALLOWING APPEAL—November 5, 1924

This cause this day came on to be heard in vacation upon petition of Martha Lum, et al. asking for a writ of Mandamus directed to the Superintendent and Trustees of the Rosedale Consolidated High School and to the State Superintendent of Education of Mississippi to compel them to admit the said Martha Lum as a pupil in said High School and upon the demurrer of the Defendants to said petition, and it appearing to the court that at the last regular term of this court an order was entered taking this cause under advisement to be heard on this date, and the court having considered the petition and the demurrer thereto, and having heard and carefully considered the authorities and argument of counsel for all parties, and being of the opinion that the demurrer should be overruled, therefore.

It is by the court ordered that the demurrer be and the same is hereby overruled and the Clerk of the Circuit Court [fol. 11] of the First Judicial District of Bolivar County, Mississippi, is hereby ordered and instructed to issue a writ of mandamus as prayed for in the petition directed to J. H. Nutt, G. P. Rice, L. C. Brown, H. H. McGowan and W. F. Bond, directing them to admit petitioner, Martha Lum, as a pupil in the Rosedale Consolidated High School as prayed for in the petition.

Upon motion properly made, defendants are hereby granted an appeal to the Supreme Court of the State of Mississippi.

Ordered and adjudged this the 5th day of November, 1924.

William A. Alcorn, Jr., Judge, &c.

[fol. 12] In Circuit Court of Bolivar County

[Title omitted]

Petition for Appeal—Filed December 5, 1924

To the Honorable Circuit Court of Bolivar County:

Now comes G. P. Rice, et al., defendants in the above styled cause, and respectfully show to the Court that on the 5th day of November, 1924, the Circuit Judge of said district did, in vacation, render judgment against defendants in the above styled cause, and they and each of them feeling aggrieved at said judgment, pray an appeal to the Supreme Court of the State of Mississippi, and request that the proper record be made at once and transmitted to the Clerk of the Supreme Court.

Rush H. Knox, Attorney General, for and on behalf of defendants, by E. C. Sharp, Assistant Attorney General.

[File endorsement omitted.]

[fol. 13] Clerk's certificate to foregoing papers omitted in printing.

[fol. 13½] Minute entry of argument and submission of cause, April 6, 1925, omitted in printing.

[fol. 14] IN SUPREME COURT OF MISSISSIPPI

In Banc

No. 24773.

G. P. RICE et al.,

v.

GONG LUM, MARTHA LUM, by Next Friend, CHEW HOW

OPINION—Filed May 11, 1925

ETHRIDGE, J.:

The appellees were plaintiffs in the court below and filed a petition for a mandamus against the Trustees of a consolidated public school for the White Race in Bolivar County, Mississippi, known as the Rosedale Consolidated High School, and situated at Rosedale in Bolivar County, Mississippi, against the County Superintendent of Education, and against the State Superintendent of Education, to compel said Trustees and said County and State Superintendents of Education to admit Martha Lum, a minor of school age, of pure Chinese and Mongolian Race, to rights of scholarship in said public school.

It is alleged that Martha Lum is a resident of said school district and is a native born citizen of the United States, that her parents were residents of the United States and engaged in the mercantile business, and not directly or indirectly connected with the consular service, or any other service, of the Government of China, or any other government, at the time of her birth; that she sues by her next friend, Chew How, who is also a native born citizen of the United States and of the State of Mississippi; and her father joined in the said petition as parent.

[fol. 15] It is alleged that said Martha Lum is a girl of good moral character between the ages of 5 and 21 years, and an educable child, and that it is her father's duty under the law to send her to school, and that she desires to attend the Rosedale Consolidated School; that at the opening of said school she appeared as a pupil but was notified by the principal of the said public school in charge thereof that she

would have to return home and would not be allowed to attend that school. It is further alleged that she was excluded from said public school on the ground that she was of Chinese descent, and therefore not a member of the White or Caucasian Race, and that said order excluding her from attendance at said public school was made in obedience to instructions from the State Superintendent of Education of Mississippi.

It is further alleged that there is no school maintained in that district of Bolivar County for the education of Chinese children and none in the County. It is further alleged that the Constitution of the State requires that public schools be conducted and that the State provides a general fund from the State Treasury to maintain a school term of at least four months of each year, but that any county or separate school district may levy an additional tax to maintain the public schools for a longer time than the four months term, and that said common school fund shall be dis- [fol. 16] tributed among the several Counties and separate School districts in proportion to the number of educable children in each in a manner provided by law, and that the State Constitution provides that it is the duty of the Legislature to encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement, by establishing a uniform system of free public schools by taxation or otherwise, for all children between the ages of five and twenty-one years, and as soon as practicable to establish schools of higher grade, That in obedience to the said provision of the Constitution, the Legislature provided by law for the establishment and for the payment of the expenses of the Rosedale Consolidated School.

It is further averred that petitioner's father is a taxpayer in said District and County and helps support and maintain said school, that the said Martha Lum is an educable child between the ages of 5 and 21 years, and a resident within said District, and is entitled to attend said school as a pupil; that it is made the duty of her father to have her attend school, and that this is the only school conducted in said district available for her as a pupil; and that the right to attend said school is a valuable right; that she is not a member of the Colored Race, nor is she of mixed blood, but that she is of pure Chinese origin and de-

scent, and a native born citizen of the United States and of the State of Mississippi, and of the Rosedale School Dis-
[fol. 17] trict, and therefore an educable child and qualified to attend said school and has a right to do so; but that she is advised that on notification of the said State Superintendent of Education to the County Superintendent of Education and to the Board of Trustees of said public school that said Trustees of the Rosedale Consolidated School deny her the right to attend said school solely and exclusively on the grounds above stated, and that said exclusion from said public school denies her rights secured to her as a citizen of the State of Mississippi; that she is deprived thereof without due process of law, and on account of her being of Chinese descent and therefore a member of the Mongolian Race, and it is alleged that this is done without due protection of the law and contrary to the provisions of the Constitution of the United States, wherefore petitioner prays for a writ of mandamus to compel said public school authorities to admit said Martha Lum to attend said public school at Rosedale as a pupil.

The petition was demurred to on a number of grounds, among others that the bill shows on its face that complainant is a member of the Mongolian or Yellow Race, and therefore not entitled to attend the public schools provided by law in the State of Mississippi for children of the Caucasian or White Race. The demurrer was overruled and a writ of mandamus granted, commanding said school authorities to permit petitioner, Martha Lum, to attend said Rosedale Consolidated School as a pupil thereof.

[fol. 18] Section 207 of the State Constitution of 1890 provides: "Separate schools shall be maintained for children of the white and colored races." This section of the Constitution is followed by statutes of the State providing for such schools, using the term "white" and "colored" throughout so far as the law applies to the public schools.

By statute it is provided that all the territory of each County of the State shall be divided into school districts separately for the White and Colored Races, that is to say the whole territory is to be divided into White school districts, and then a new division of the County for Colored school districts. In other words the statutory scheme is to make the districts outside of the separate school districts

districts for the particular Race, White or Colored, so that the territorial limits of the school districts need not be the same, but the territory embraced in a school district for the Colored Race may not be the same territory embraced in the school District for the White Race, and vice versa, which system of creating the common school districts for the two Races, White and Colored, do not require schools for each Race as such to be maintained in each district, but each child, no matter from what territory, is assigned to some school district, the school buildings being separately located and separately controlled, but each having the same curriculum and each having the same number of months of school term if the attendance is maintained for the said statutory period, which school district of the common or public schools has certain privileges, among which is to maintain a public school by local taxation for a longer [fol. 19] period of time than the said term of four months under named conditions which apply alike to the common schools for the White and Colored Races.

In Moreau v. Grandich, 114 Miss. 560, 75 So. 434, we held that the right to attend the public schools was a legal right and enforcible in the courts, and that mandamus was the proper remedy to enforce the rights secured under the school law. We also held that the term "White" used in the above section of our constitution means members of the Caucasian Race, It was also said that the word "colored" included not only Negroes but persons of mixed blood. In the argument in the present case it is insisted that this definition of "colored" limited and restricted the term "colored" entirely to persons of the Negro Race or who were of Negro descent. We think a careful reading of the opinion in the Moreau v. Grandich case, supra, in the light of the statement of the facts, shows that the court did not intend to restrain the term "colored" to persons having Negro blood in their veins or who were descendants of Negroes or of the Negro Race. For prudent reasons the court did not go beyond the calls of that case in reference to this term.

In order to determine the meaning of the terms used in the above section of the Constitution, it will be necessary to consider other expressions in the same Constitution, and also legislation of the State bearing on the segregation of

the Races. In Section 263 of the Constitution it is provided [fol. 20] that marriage of a person of the White Race with a Negro or mulatto or with a person having one-eighth or more of Negro blood shall be unlawful and void. It will be noted in this section that the terms "negro", and "mulatto", "or person who shall have one-eight- or more of Negro blood," were used, and the constitutional prohibition against marriages between the races is confined to Negroes and those having one-eighth or more of Negro blood. In Moreau v. Grandich, supra, we held that one-eighth of Negro blood provided in the section relating to intermarriages was not controlling in fixing the status of the Races for school purposes under Section 207 of the Constitution. It will also be noted that Section 207 of the Constitution instead of using the word "Negro" or having a specific quality of Negro blood, uses the word "colored" in describing the opposite Races from the White Race.

In Section 2859, Code of 1892, just two years after the Constitution of 1890 was adopted, the Legislature prohibited marriages between the White and Mongolian Races, and between persons of the White Race and persons having one-eight- or more of Mongolian Blood. The same section also prohibited intermarriage between persons of the White Race with those of Negro blood or one-eighth Negro blood, the prohibition with reference to marriages being identical in each case as to the Negro and Mongolian races.

[fol. 21] It will be noted further that neither Section 263 of the Constitution nor Section 2859 of the Code of 1892, which statute has been constantly in force since that date, prohibits any marriage or social relations between the Negro and Mongolian Races and they are left free to maintain such a social, including marriage, relations as they see proper to enter into.

Why did the Constitution use the term "Negro" in one section, and the term "colored" in the other section?

To all persons acquainted with the social conditions of this State and of the Southern States generally, it is well known that it is the earnest desire of the White Race to preserve its racial integrity and purity and to maintain the purity of the social relations as far as it can be done by law. It is known that the dominant purpose of the two sections of the Constitution of our State was to preserve the in-

tegrity and purity of the White Race. When the public school system was being created it was intended that the White Race should be separated from all other Races. It is that the Negro Race was the only Race of consequence so far as numbers were concerned. There were then some other Races living within the State of course. So far as we have been able to find, the word "white" when used in describing the Race is limited strictly to the Caucasian Race, while the word "colored" is not strictly limited to Negroes or persons having Negro blood.

[fol. 22] One of the definitions given to the word "colored" as applied to Race is "of a dark skin or non-Caucasian Race." Standard Dictionary. The same definition is practically given by Mr. Webster in his Dictionary.

The word "white" as applied to Race, where not effected by statutory definition, is universally limited to the Caucasian Race.

The United States Courts have often dealt with the term "White Race" when passing on questions of naturalization, it being provided by Federal statutes originally that only persons of the White Race could be naturalized. But after the Civil War the statute was amended so as to provide for the naturalization of aliens of African nativity and to persons of African descent. In the decisions of the Supreme Court of the United States it is expressly held that Mongolians do not come within the term "white" as used in reference to Race. See the case of Ah Yup, 5 Sawyer, 155 Federal Cases, 140, which has subsequently been followed by that Court. See also Ozawa v. United States, 260 U. S. 178, 67 L. ed. 199, and Yamashita v. Hinkle, 260 U. S. 198, 67 L. ed. 209.

In its opinion in the Ozawa case, supra, the Court said:

[fol. 23] "The question is then, 'Who are comprehended within the phrase 'free white persons'? Undoubtedly the word 'free' was originally used in recognition of the fact that slavery then existed, and that some white persons occupied that status. The word, however, has long since ceased to have any practical significance and may now be disregarded.

"We have been furnished with elaborate briefs in which the meaning of the words 'white persons' is discussed with

ability and at length, both from this standpoint of judicial decision and from that of the science of ethnology. It does not seem to us necessary, however, to follow counsel in their extensive researches in these fields.

"It is sufficient to note the fact that these decisions are in substance, to the effect that the words import a racial and not an individual test, and with this conclusion, fortified as it is by reason and authority, we entirely agree. Manifestly the test afforded by the mere color of the skin of each individual is impracticable, as that differs greatly among persons of the same race, even among Anglo-Saxons, ranging by imperceptible graduations from the fair blond to the swarthy brunette, the latter being darker than many of the lighter hued persons of the brown or yellow races. Hence to adopt the color test alone would result in a confused overlapping of races and a gradual merging of one into the other, without any practical line of separation. Beginning with the decision of Circuit Judge Sawyer, In re Ah Yup (1878) 5 Sawyer, 155, Federal Cases, No. 104, the Federal and State courts in an almost unbroken line have [fol. 24] held that the words "white persons" were meant to indicate only a person of what is popularly known as the Caucasian Race. Among these decisions see, for example; Re Camille, 6 Sawyer, 541, 6 Fed. 256, Re Saito, 62 Fed. 126; Re Nian, 6 Utah, 259, 4 L. R. A. 726, 21 Pac. 993; Re Kumagai, 163 Fed. 922; Re Yamashita, 30 Wash. 234, 257, 59 L. R. A. 761, 94 Am. St. Rep. 860, 70 Pac. 482; Re Ellis, 179 Fed. 1002; Re Mozunder, 207 Fed. 115, Re Singh, 257 Fed. 209, 211, 212; and Re Charr, 273 Fed. 207. With the conclusion reached in these several decisions we see no reason to differ. Moreover, that conclusion has become so well established by judicial and executive concurrence and legislature acquiescence that we should not, at this late day, feel at liberty to disturb it, in the absence of reasons far more cogent than any that have been suggested. United States v. Midwest Oil Co. 236 U. S. 459, 472, 59 L. ed. 673, 680, 35 Sup. Ct. 309.

"The determination that the words 'White person' are synonymous with the words 'a person of the Caucasian race' simplifies the problem, although it does not entirely dispose of it. Controversies have arisen and will no doubt arise again in respect to the proper classification of individuals in border-line cases."

[fol. 25] In the case of Yamashita, 30 Washington, 234 the Court said:

"The courts, Federal and State, have uniformly determined that Chinese are not eligible to naturalization because not white persons."

In the same opinion the Court discusses the divisions of the human race and adopts that of Blumenbach who classifies the races as follows:

"1. The Caucasian, or white race, to which belong the greater part of the European nations and those of Western Asia; 2. The Mongolian or yellow race, occupying Tartary, China, Japan, &c.; 3. The Ethiopian, or Negro race, occupying all Africa, except the North; 4. The American, or red race, containing the Indians of North and South America; and 5. The Malay, or brown race, occupying the islands of the Indian Archipelago."

See, also, 7 Cyc., 167; Plessy v. Ferguson, 163 U. S. 537; and Cory v. Carter, 48 Ind. 327, 17 Am. Rep. 738.

In Adelle v. Beauregard, 1 Martin, (La. 1810), 183, at p. 184, in discussing the question of the color of persons as persons of color, the Court said:

"Persons of color may have descended from Indians on both sides, from a white parent, or mulatto parents in pos-
[fol. 26] session of their freedom."

In State v. Chavers, 50 N. C. 11, the Court was called on to construe the phrase "free person of color" as used in a statute of that State which provided: "That all free persons descended from negro ancestors to the fourth generation inclusive, though one ancestor of each generation may have been a white person, shall be deemed free negroes and persons of mixed blood." The defendant was indicted as a "free person of color" for carrying a shot-gun about his person contrary to that statute. The indictment was demurred to on the ground that the phrase "free person of color" might apply to other persons than those of Negro descent. At page 15, 50 N. C., the court said:

"Free persons of color may be, then, for all we can see, persons colored by Indian blood, or persons descended from

Negro ancestors beyond the fourth degree. The indictment then, in the present case, may embrace a person who is not a free negro within the meaning of the act, and for that reason it cannot be sustained."

In the case of People v. Hall, 4 California, 399, the Supreme Court of California had under consideration the question of the admissibility of evidence against a white person by a Chinaman, a witness, under a statute which provided in one section that no Indian or Negro shall be allowed to testify as a witness in any action in which a white person is a party, and another statute which provided, "No Black, or Mulatto person, or Indian shall be allowed to give evidence for or against a White person." At page 403, 4 Calif., the Court said:

[fol. 27] "The word 'Black' may include all Negroes, but the term 'Negro' does not include all Black persons.

"By the use of this term in this connection, we understand it to mean the opposite of 'White,' and that it should be taken as contradistinguished from all White persons.

"In using the words, 'No Black, or Mulatto person, or Indian shall be allowed to give evidence for or against a White person,' the Legislature, if any intention can be ascribed to it, adopted the most comprehensive terms to embrace every known class or shade of color, as the apparent design was to protect the White person from the influence of all testimony other than that of persons of the same caste. The use of these terms must, by every sound rule of construction, exclude every one who is not of white blood. * * *

"The word 'White' has a distinct signification, which ex vitermini, excludes black, yellow, and all other colors. It will be observed, by reference to the first section of the second article of the Constitution of this State, that none but white males can become electors, except in the case of Indians, who may be admitted by special Act of the Legislature. On examination of the constitutional debates, it will be found that not a little difficulty existed in selecting these precise words, which were finally agreed upon as the most comprehensive that could be suggested to exclude all inferior races.

[fol. 28] "If the term 'White,' as used in the Constitution, was not understood in its generic sense as including the Caucasian race, and necessarily excluding all others, where was the necessity of providing for the admission of Indians to the privilege of voting, by special legislation?

"We are of the opinion that the words 'White,' 'Negro,' 'Mulatto,' 'Indian,' and 'Black person,' wherever they occur in our Constitution and laws, must be taken in their generic sense, and that even admitting the Indian of this Continent is not of the Mongolian type, that the words 'Black person,' in the 14th section must be taken as contradistinguished from White, and necessarily excludes all races other than the Caucasian."

In State v. Treadaway, 126 La. 300, 52 So. 500, 139 Amer. St. Rep. 514, at p. 531, the Court in discussing the meaning of the word "colored," after reviewing numerous statutes and decisions defining the term, says:

"These decisions are au*h*tority that a negro is necessarily a person of color; but not that a person of color is necessarily a negro. There are no negroes who are not persons of color; but there are persons of color who are not negroes."

While the court in the Treadaway case, supra reached the conclusion that under the Louisiana statutes and decisions the term "colored persons" was limited to Negroes and those having Negro blood, it recognized that the term [fol. 29] "colored persons" was not necessarily limited to Negroes and those having an admixture of Negro blood in their veins.

As shown by the above definitions the term "white" as used in Section 207 of our Constitution is limited to the Caucasian Race. We have found no definition to the contrary except where it was a legislative definition embraced either in a statute or a constitution. Some of the States have statutory definitions that make the term "White Race" include other races. But when no such statutory definition exists all the authorities hold that the term "white" as applied to race does not embrace any other than the Caucasian. On the other hand the term "colored" as applied to race may include any race other than the Caucasian or White Race. Most of the States have defined by

statutes what constitutes a "colored person," or a "colored race," and of course where the statutes have defined these terms the courts follow the statutory definition.

In our State no statute has defined the term "colored race" and considering the policy of the State indicated above we think that the Constitutional Convention used the word "colored" in the broad sense rather than the restricted sense, its purpose being to provide schools for the White or Caucasian Race, to which schools no other race could be admitted, carrying out the broad dominant purpose of preserving the purity and integrity of the White Race and its social policy.

It is said by the appellant that this court in the case of Heirn v. Bridault, 37 Miss. 209, construed the phrase "Free [fol. 30] woman of color" as synonymous with "free Negro," and that this definition is to be carried into the Constitution and so interpreted would mean the "Negro Race or persons having Negro blood," and would not include a member of the Mongolian race. In the case of Heirn v. Bridault, supra the court held that the phrase "free woman of color," as used in the instrument there under consideration was synonymous with "free Negro." But we do not think that this decision is authority for holding that the Constitution makers intended the phrase to be used in the limited and restricted sense. It is true that the general meaning of the words "colored person" is understood to refer to a Negro or a person having Negro blood. But that is not the only definition of the phrase "a colored person," and it is clear that the Constitutional Convention of 1890 was using every means at its command to protect and preserve the White Race from admixture with other races.

We must construe the Constitution so as to give effect to the intention of its makers. Taking all of the provisions of the law together it is manifest that it is the policy of this State to have and maintain separate schools and other places of association for the Races so as to prevent race amalgamation.

Race amalgamation has been frowned on by Southern Civilization always, and our People have always been of the opinion that it was better for all races to preserve their purity.

However, the segregation laws have been so shaped as to show by their terms that it was the White Race that was [fol. 31] intended to be separated from the other races. The Legislature has in some of the statutes provided for special schools for the Indian race, and any other race unprovided for, but under the general school laws a number of pupils are required to create one of these special schools.

The Legislature is not compelled to provide separate schools for each of the colored races and unless and until it does provide such schools and provides for segregation of the other races, such races are entitled to have the benefit of the colored public schools. Under our statutes a colored public school exists in every county and in some convenient district in which every colored child is entitled to obtain an education. These schools are within the reach of all the children of the State, and the plaintiff does not show by her petition that she applied for admission to such schools. On the contrary the petitioner takes the position that because there are no separate public schools for Mongolians that she is entitled to enter the white public schools in preference to the colored public schools. A consolidated school in this State is simply a common school conducted as other common schools are conducted, the only distinction being that two or more school districts have been consolidated into one school. Such consolidation is entirely discretionary with the County school board having reference to the condition existing in the particular territory. Where a school district has an unusual amount of territory, with an unusual valuation of property therein, it may levy additional taxes. But the other common schools under similar statutes have the same power.

If the plaintiff desires she may attend the colored public school of her district, or if she does not so desire, she may go to a private school. The compulsory school law of this [fol. 32] State does not Require the attendance of a public school, and a parent under the decisions of the Supreme Court of the United States has a right to educate his child in a private school if he so desires. But plaintiff is not entitled to attend a white public school.

Therefore the judgment of the court below will be reversed and the petition dismissed.

Reversed and dismissed.

[File endorsement omitted.]

[fol. 33] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

JUDGMENT—May 11, 1925

This cause having been submitted on a former day of this term on the record herein from the Circuit Court of Bolivar County, First District, and this court having sufficiently examined and considered the same and being of opinion that there is error therein, doth order and adjudge that the judgment of said Circuit Court rendered in this cause on the 5th day of November, 1924 be and the same is hereby reversed and the petition dismissed and that appellees do pay the costs of this cause in this court and in the court below to be taxed, etc.

[fol. 34] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

ORDER EXTENDING TIME—May 26, 1925

Ordered that 15 days' additional time be allowed in which to file suggestion of error.

[fol. 35] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

SUGGESTION OF ERROR—Filed June 10, 1925

Come the Appellees in this cause and respectfully suggest that this court in reversing the judgment of the court below herein, and in entering judgment dismissing the petition has erred in the following particulars, to-wit:

1. The Court has erred in holding that the Appellees belong to what is known as the colored race.

2. The Court has erred in holding that Sec. 207 of the Constitution of the State of Mississippi of 1890, applies to members of the Chinese race in that part of it which re-

quires special schools to be maintained for the colored race.

3. The Court has erred in classifying the members of the Chinese race with the members of the colored or negro race with respect to the rights and privileges of citizens or children of citizens of the State to attend the public schools.

4. The Court has erred in denying to appellees the right to attend or the right to send their children to the white schools of the State.

5. The Court has erred in holding that there is any other school available to these Appellees or their children affording facilities and accommodations and advantages equal to those furnished by the white school which the Appellee Martha Lum sought to enter and attend.

6. So far as this record shows, there is no other school, white or colored in the district in which Martha Lum lives [fol. 36] nor is there any other school, white or colored, accessible to her or within the reach of these Appellees or their children, or within the reach of or accessible to Martha Lum.

7. The opinion of the Court assumes a fact not shown of record, to-wit: That there is within the reach of Martha Lum, and accessible to her, a school of equal facilities and advantages which she might attend.

8. The petition filed herein alleges and charges that this particular school she offered to enter, and which she was denied the right to attend "is the only school conducted in the said district available for her as a pupil," and this allegation or charge in the petition is admitted by the demurrer to be true.

9. The denial of the right to Martha Lum to attend the public school which she offered to enter, in the face of the fact that this is the only public school available to her as a citizen, is a denial to her of the rights and privileges guaranteed to her by the 14th amendment to the Constitution of the United States, and especially to that part of said 14th amendment prohibiting any State to deprive any person of life, liberty, or property without due process of law

or to deny to any person within its jurisdiction the equal protection of the laws.

10. To deny to the father of Martha Lum who is a citizen of the State of Mississippi, and of the district in which the school in question is located, the right to send his child to the school, in the absence of any showing that another school with equal facilities and advantages is available to him, and in the face of the fact that no other such school is available to him, is to deny to him the rights and privileges guaranteed by the provision of Section 1 of Article 14 of the Constitution of the United States set forth in the preceding paragraph.

[fol. 37] 11. To deny to Martha Lum and her father the right to attend and patronize the school in question in the face of the admitted fact that there is no other scholl of equal facilities and advantages in the district available to them, is to deny to them the rights and benefits and advantages provided for all citizens of the State of Mississippi by Sec. 201 of the Constitution of the State of 1890.

12. To deny the right of Gong Lum to send his child to the Rosedale Consolidated High School, and the right of Martha Lum to attend the said school is ti deny to them the rights and privileges as citizens of the United States guaranteed to them by the Constitution as aforesaid, and by the treaties of the United States with the Chinese Government.

Other errors will be assigned.

Brewer, Brewer & McGehee, Flowers, Brown & Hester, Attorneys for Appellees.

We certify that we have this day mailed to Messrs. Rush Knox, Attorney General and E. C. Sharp, Attorney of record for Appellants, a copy of this suggestion of error, this the 10th day of June, 1925.

Earl Brewer, J. N. Flowers, Attorneys for Appellees.

[File endorsement omitted.]

[fol. 38] IN SUPREME COURT OF MISSISSIPPI

ORDER OVERRULING SUGGESTION OF ERROR—July 31, 1925

[Title omitted]

The undersigned judges having read and considered the suggestion of error herein have determined to overrule same.

Geo. H. Ethridge, W. D. Anderson, J. B. Holden, Sydney Smith.

[fol. 39] IN SUPREME COURT OF MISSISSIPPI

EXCERPT FROM RULES OF SUPREME COURT RE SUGGESTION OF ERROR

Rule 14—Supreme Court of Mississippi

Suggestion of Error

(1) The losing party may within fifteen days after a judgment is rendered in this Court file a written suggestion of error of law or fact therein and the Court will take such action thereon as it may deem proper. Upon good cause shown this time may be extended to thirty days; but an application for such an extension must be filed within the original fifteen days.

(2) An adjournment of Court less than fifteen days after the rendition of a judgment shall not preclude the filing of a suggestion of error therein, but the same may be filed with the clerk within the time prescribed for presenting such suggestion of error to the Court, whereupon all proceedings on the judgment shall be stayed until it shall be acted upon at the next session of the Court, unless a majority of the judges of the Court shall certify in writing to the clerk prior to the next term that they have considered the suggestion of error and have determined to overrule it; upon receipt of such certificate such proceedings shall be had as if a suggestion of error has not been filed.

(3) No reply to a suggestion of error shall be filed unless the Court by special rule, otherwise, shall call therefor. But no suggestion of error will be sustained to the prejudice of the adverse party until he has been given an opportunity of replying thereto. After a suggestion of error has been sustained, or overruled, by the Court, no further suggestion of error shall be filed by any party.

(4) Any suggestion of error containing language showing disrespect or contempt for this Court will be stricken from the files, and the Court will take such further action relative thereto as it may deem proper.

[fol. 40] Certificate to foregoing papers omitted in printing.

[fol. 41] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed October 16, 1925

To Hon. Sidney Smith, Chief Justice of the Supreme Court of the State of Mississippi:

Petitioners Martha Lum, by next friends, Chew How, and Gong Lum, by their attorneys, respectfully show as follows:

These petitioners filed in the circuit court sitting in and for the first judicial district of Bolivar County, Mississippi, on the 29th day of September, 1924, their petition against J. H. Nutt, Superintendent of the Rosedale Consolidated High School, and G. P. Rice, L. C. Brown and Henry McGowan, members of the Board of Trustees of the said school, and W. F. Bond, State Superintendent of Education, charging that Martha Lum, a child nine years old, a resident of the said school district, a citizen of the State of Mississippi and of the United States and whose parents were and are citizens of the State of Mississippi and of the said school district, the said Martha Lum appearing by Chew How, next friend, had offered and undertaken to attend the said school and had been denied the right to so attend the school solely on the ground that she was a

Chinese child; and charging further that there was no other school maintained in the district for the education of Chinese children or children of Chinese descent; and that the said Martha Lum was an educable child of the district and was desirous of attending school and in no way disqualified; [fol. 42] that her father was a taxpayer in the district and helped support and maintain the schools and that this was the only school conducted in the said district available to her as a pupil; that the right to attend the public schools is a valuable right; that the said child and her father are entitled to the enjoyment of the said right; that the board of trustees and the superintendent of the said school, acting under the orders of the said superintendent of education denied to the child the right to attend the said school under the circumstances above enumerated; that to deny her the right to attend the public schools was and is to deny to her and to her father the equal protection of the laws and to take away valuable rights without due process of law.

The defendants named in the petition for mandamus, through counsel, demurred to the petition on the grounds indicated in the said demurrer contained in the record submitted with this present petition. The demurrer was overruled by the circuit judge and the writ of mandamus ordered to be issued.

The defendants in the said circuit court case appealed to the Supreme Court of Mississippi and on the 11th day of May, 1925, the judgment of the said circuit court was reversed and the petition for mandamus dismissed.

After the said judgment was entered in the Supreme Court of Mississippi a suggestion of error was filed by these petitioners, under the rules of that court, a copy of which suggestion of error is contained in the transcript presented herewith. The said suggestion of error was overruled on the 31st day of July, 1925, as appears from the order of this court made a part of the record presented with this petition.

Petitioners further show that the statutes of the state of Mississippi defining the powers and duties of the public school authorities in the establishment of schools and especially in providing separate schools for the races and in distributing the public school fund raised by levying taxes upon all the property in the state depend upon sec-

[fol. 43] tions 201 and 207 of the constitution of Mississippi of 1890.

Section 201 of the said constitution is as follows:

"It shall be the duty of the legislature to encourage by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement, by establishing a uniform system of free public schools by taxation or otherwise, for all children between the ages of five and twenty-one years, and, as soon as practicable, to establish schools of higher grade."

Section 207 is as follows:

"Separate schools shall be maintained for children of the white and colored races."

Petitioners now further show that in this case the Supreme Court of Mississippi has construed the said section 207 to mean that separate schools shall be provided for the white or Caucasian race and that other schools shall be provided for the other races together; that the children of other races may all be assembled in one school but that the children of the Caucasian race shall be provided for in a school which none but the children of the Caucasian race may attend. The Caucasian race under this construction is the only one for whose children separate schools may be maintained. Petitioners show that this construction of the said section 207 makes it discriminatory; makes it bear unequally and partially upon the children of other races and especially upon the class to which petitioner Martha Lum belongs; that the construction and application of the said section 207 make it violative, in so far as these petitioners are concerned, of the Fourteenth Amendment of the Constitution of the United States in that petitioners are being denied the equal protection of the laws and their property rights are taken away without due process of law.

[fol. 44] Petitioners show further that this Chinese child Martha Lum is held not entitled to attend the only school in the district available and this without any denial of the charge that there is no other school that she might attend and without any showing that there had been provided any school with equal facilities and advantages which the Chinese child would be allowed to attend. Under said sec-

tion 201 of the constitution this Chinese child is entitled to the same rights and privileges in the way of school facilities as are provided for the children of the white race. But without any showing in the record that any other school has been provided which this child might attend it was held by the Supreme Court of Mississippi that she could not attend the school provided for white children. Such holding, petitioners show and charge, so construes section 207 of the constitution as to enable the public authorities in control of the public school system to take away property rights, to wit: the rights to share in public school facilities which these petitioners possess along with other children and citizens, all in contravention of the said Fourteenth Amendment which prohibits any state to deny to any persons within jurisdiction the equal protection of the laws or to take the property of such persons without due process of law.

Petitioners show further that the above questions have been depended upon in the presentation of this case to Supreme Court of Mississippi, as indicated by the record and have been decided adversely to the claims of these petitioners; and that final judgment was rendered in this case when the suggestion of error was overruled on the 31st day of July 1925 and this, the Supreme Court of Mississippi, is the highest court in the state to which the said cause might be carried by appeal or otherwise.

Petitioners further show that the said questions are presented by the assignment of errors presented with this petition.

[fol. 45] Wherefore petitioners pray for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Mississippi and the Judges thereof to the end that the record on said matter may be removed into the Supreme Court of the United States, and the error complained of by your petitioners may be examined and corrected and said judgment reversed and the rights of petitioners affirmed; and your petitioners will ever pray.

Brewer, Brewer & McGehee, Flowers, Brown & Hester, Attorneys for Plaintiffs in Error.

[File endorsement omitted.]

[fol. 46] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

ORDER ALLOWING WRIT OF ERROR—Filed October 16, 1925

The above-entitled matter coming on to be heard upon the petition of the appellant therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the state of Mississippi, and upon examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter—

It is ordered that a writ of error be, and is hereby allowed to this court from the Supreme Court of the United States, and that the bond presented by said petitioner be, and the same is hereby, approved.

Sydney Smith, Chief Justice of the Supreme Court of the State of Mississippi.

Oct. 16, 1927.

[File endorsement omitted.]

[fol. 47] IN SUPREME COURT OF MISSISSIPPI

WRIT OF ERROR—Filed October 16, 1925

UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Mississippi, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said Supreme Court before you, or some of you, being the highest court of law or equity of the said state in which decision could be had in the said suit between Gong Lum and others, appellees, in your said court, and G. P. Rice and others, appellants in said cause in your court, wherein was drawn in question the validity of a treaty or statute of or an authority exercised

under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said state on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of their validity, or wherein was drawn in question the constitution or a clause of the Constitution, or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege or immunity especially set up or claimed under such clause of the said Constitution, statute, treaty or commission; a manifest error had happened to the great damage of the said appellees, as is said and appears by their complaint. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein [fol. 48] to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, this 16th day of October in the year of our Lord one thousand nine hundred and twenty-five.

Jack Thompson, Clerk of the United States District Court, Southern District of Mississippi. (Seal of U. S. District Court of Southern District of Mississippi.)

The above writ is allowed by Hon. Sydney Smith, Chief Justice of the Supreme Court of Mississippi.

[File endorsement omitted.]

[fol. 49] Citation, in usual form, showing service on Rush H. Knox and E. C. Sharp, filed October 16, 1925, omitted in printing.

[fols. 50 & 51] Bond on writ of error for $500.00 approved and filed October 16, 1925, omitted in printing.

[fol. 52] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

ASSIGNMENTS OF ERROR—Filed October 16, 1925

Come the plaintiffs in error by counsel and assign the following errors in the final decision of this cause by the Supreme Court of Mississippi:

1. The court erred in holding that Martha Lum, a native born citizen of the State of Mississippi and the child of citizens of the State of Mississippi and of the United States of good moral character and within school age, has not the right to attend the public school of the district of her residence, it appearing from this record that there is in the district no other school which the child might attend, and no other school accessible to her.

2. The court erred in holding that the said Chinese child was properly excluded from the school she tried to enter and attend on the sole ground that she is of Chinese blood, in the absence of any showing that there was another school accessible offering equal accommodations and opportunities, which the child could attend.

3. The court erred in denying the right of Martha Lum to attend the school in question and the right of her father to send her to the said school because such denial, is of rights guaranteed to persons within the jurisidiction of the state in and by the Fourteenth Amendment of the constitu-
[fol. 53] tion of the United States which provides that no state shall "deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. The court erred in holding that the rights of the child and of her father are protected by extending to them the privilege of attending and patronizing the colored or negro schools because (1) it does not appear that there was any negro school accessible nor that, if there was, it was a school offering equal advantages with the white school which the child offered to attend, and (2) it is an unreasonable, unjust and arbitrary discrimination and classification to put the Chinese in a class with the members of a race wholly different from them in racial characteristics and thus to extend school facilities in such shape and under such conditions as to deprive them of their value or render them impossible of enjoyment.

5. Section 207 of the constitution of the State of Mississippi as the said section is construed and applied herein by this court (the Supreme Court of Mississippi) is in contravention of the constitution of the United States in that it denies to these Chinese citizens within the jurisdiction of the state the equal protection of the laws and takes their property without due process of law in that it makes an unreasonable and arbitrary classification of the citizens based solely upon color for the purpose of organizing schools and using the public school fund and assigns to the same school the children of all races except the Caucasian race.

6. The court erred in applying the said section 207 in such way as to effect the segregation of the white or Caucasian race from all the rest and to require the children of all other races to attend the same school. Such con-
[fol. 54] struction and application make the said section violative of the said Fourteenth Amendment in that the property of the complaining citizens in taken without due process of law and they are denied the equal protection of the laws.

7. Under section 201 of the Mississippi Constitution of 1890 all children in the state without regard to race or color are entitled to the advantages of the uniform system of public schools; and under the said Fourteenth Amendment all persons within the jurisdiction of the state must enjoy the equal protection of the laws. Section 207 of the constitution of Mississippi of 1890 which provides that "separate schools shall be maintained for children of the white and

colored races," as enforced by the administrative officers and as construed by the Supreme Court of the State, in this case violates the said Fourteenth Amendment in that such construction operates solely to the advantage of the Caucasian race, placing children of that race in a class to themselves and the children of all other races in one class, thus providing for the children of the Caucasian race a privilege which is denied to the children of the other races.

8. The court erred in holding that the petition for the writ of mandamus presented no facts entitling these plaintiffs in error to relief and in dismissing the said petition.

9. Other errors to be assigned.

Brewer, Brewer & McGehee, Slavers, Brown & Nester, Counsel for Plaintiffs in Error.

[File endorsement omitted.]

[fol. 55] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed October 16, 1925

To Hon. W. J. Buck, clerk:

This is to advise that the writ of error has been allowed in the above styled cause; and you are requested to transscribe and transmit to the clerk of the Supreme Court of the United States the following parts of the record and files in your office, in the cause on your docket styled G. P. Rice, et al. vs. Gong Lum, et al. No. 24773 on your said docket:

1. The petition for mandamus filed in the circuit court of Bolivar County, Mississippi.

2. The demurrer to the said petition filed in the said trial court.

3. The judgment of the trial court.

4. The assignment of errors filed in the Supreme Court of Mississippi by G. P. Rice, et al. appellants.

5. The opinion of the Supreme Court deciding the cause.

6. The judgment of the Supreme Court on the said decision.

7. Order allowing additional time to file suggestion of error.

8. The suggestion of error filed by the appellees, Gong Lum et al.

9. The judgment or order of the Supreme Court over-
[fol. 56] ruling the suggestion of error.

10. Rules of the Supreme Court of Mississippi dealing with the filing of suggestions of error.

Brewer, Brewer & McGehee, Flowers, Brown & Hester, Counsel for plaintiffs in error.

I certify that I have this day received copy of above præcipe, 16th October, 1925.

R. H. Knox, Atty. Gen. & E. C. Sharp, Counsel for Defendants in Error.

[File endorsement omitted.]

[fol. 57] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION BY PLAINTIFF IN ERROR OF PARTS OF RECORD TO BE PRINTED, WITH PROOF OF SERVICE—Filed December 1, 1925

I

A child of school age and otherwise qualified and eligible to attend a public school in the school district wherein the child resides under statutes providing for a uniform system of free public schools, is denied the equal protection of the laws when she is excluded from such school solely on the ground that she is a Chinese child and not of the Caucasian race.

II

A child of school age and otherwise qualified and eligible to attend a public school maintained in the school district

wherein the child resides under statutes providing for a uniform system of free public schools is denied the equal protection of the laws when she is excluded from such school solely on the ground that she is a Chinese child and not of the Caucasian race where no other school with accommodations equal to those of the school from which the child is excluded is maintained which the child might attend.

[fol. 58]

III

A classification of children for the purpose of regulating public schools which puts the children of one race into a school to themselves and the children of all other races together in another school discriminates unreasonably against the children of the several races placed in the same school. Such classification creates a privilege in one race that is denied to the other races, namely, the privilege of having schools maintained for its exclusive benefit and enjoyment. The enforcement of such statutory regulations is a denial of the equal protection of the laws to the children of the several races other than the race enjoying the exclusive privilege.

IV

A taxpayer and citizen having a child of school age and otherwise qualified and eligible to attend a public school maintained in the school district wherein the child resides under statutes providing for a uniform system of free public schools, is denied the equal protection of the laws when the child is excluded from such school solely on the ground that she is a Chinese child and not of the Caucasian race.

V

A taxpayer and citizen having a child of school age and otherwise qualified and eligible to attend a public school maintained in the school district wherein the child resides, under statutes providing for a uniform system of free public schools, is denied the equal protection of the laws when the child is excluded from such school solely on the ground that she is a Chinese child and not of the Caucasian race where no other school with accommodations equal to those of the school from which the child is excluded is maintained which the child might attend.

[fol. 59] VI

Gong Lum and Martha Lum, plaintiffs in error have been denied the equal protection of the laws, as shown by this record, in that the constitution and laws of the State of Mississippi have been so construed and enforced as to uphold a classification of school children for the purpose of organizing and regulating the public schools of the state which gives to the Caucasian race the exclusive privilege of a school that none but the children of that race may attend and denies the same privilege to the children of other races including the Chinese race to which plaintiffs in error belong; and denies the right of plaintiffs in error to enjoy the privileges of the school that the Caucasian children of the district attend and this too without any showing that there is any other school plaintiffs in error might patronize or attend offering accommodations and opportunities equal to those afforded by the school provided for the Caucasian race.

Since the questions are raised on petition for mandamus and demurrer to the petition the entire record will need to be necessary to the consideration of the above points.

Respectfully submitted, J. N. Flowers, Counsel for plaintiffs in error.

We acknowledge receipt of copy of the above statement this the 28th day of November, 1925.

R. H. Knox, Counsel for Defendants in Error.

[fol. 60] [File endorsement omitted.]

Endorsed on cover: File No. 31,534. Mississippi Supreme Court. Term No. 811. Gong Lum and Chew How, next friend for Martha Lum, plaintiffs in error, vs. G. P. Rice, L. C. Brown, Henry McGowan et al. Filed November 16th, 1925. File No. 31,534.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

NO. 811

GONG LUM AND CHEW HOW, NEXT FRIEND FOR MARTHA LUM, Plaintiff in Error.

vs.

G. P. RICE, L. C. BROWN, HENRY McGOWAN, ET AL.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR

This case comes from the Supreme Court of Mississippi on Writ of Error

GROUND OF JURISDICTION

A chinese child was excluded from a public school in the Rosedale Consolidated School District of Bolivar County, Mississippi. Her father is a citizen of the the said school district and of the State of Mississippi and of the United States. She claimed the right to attend the school and her father Gong Lum claimed the right to send her to the school. They brought their suit against the

School authorities, the defendants in error, to compel them by mandamus to permit Martha Lum, the child, to attend the public school. The trial judge ordered the writ to issue; on appeal to the Supreme Court of Mississippi the judgment of the trial Court was reversed and the petition for the writ dismissed. In their original petition Martha Lum and her father claimed the protection of the 14th Amendment of the Constitution of the United States and especially that part which prohibits the state to deny to any person within its jurisdiction the equal protection of the laws. After the Supreme Court rendered its decision denying the right of the Chinese to attend or patronize the school in question the appellees (plaintiffs in error here) filed a suggestion of error under the rules of the Mississippi Supreme Court in which the question as to the protection of the 14th amendment was specifically raised. (R. 22-23) The final order overruling the suggestion of error was made on July 21, 1925. (R. 24) The petition for writ of error was filed October 16, 1925. (R. 25) The order made by the Chief Justice of the Supreme Court and the writ of error bear date October 16, 1925. (R. 29) And the assignment of errors in this court was filed on the same date. (R. 31).

The equal protection clause of the 14th amendment was invoked in the Supreme Court of Mississippi and the rights claimed thereunder were expressly denied by the Supreme Court of Mississippi, the state court of last resort. The final judgment of the Supreme Court of Mississippi (R. 21) not only reversed the judgment of the trial court but dismissed the petition.

Martha Lum, the child, and her father, plaintiffs in error, asserted the right as citizens of the school district and of the State of Mississippi, and as taxpayers to

enjoy the benefits and advantages of the public schools maintained by general taxation for the benefit of all the educable children of the State. The petition charged that there was in the district no other school the child could attend.

STATEMENT OF CASE

Petition was filed in the circuit court of Bolivar County, Mississippi, by Gong Lum, an adult, and Martha Lum, a minor, by next friend Chew How, for a writ of mandamus to compel the State Superintendent of Education and the Trustees of the school to admit Martha Lum as a pupil in the Rosedale Consolidated School. The petition averred that Martha Lum was a minor between the ages of five and twenty-one years, that she is a native born citizen of the United States and that her parents are residents of the United States and of the State of Mississippi and not directly or indirectly connected with the consular service or any other service of the Government of China or of any other government at the time that Martha was born on the 21st day of January, 1915, that her next friend Chew How is a native born citizen of the United States and of the State of Mississippi; that Martha Lum is of good moral character and a resident citizen of the Rosedale Consolidated High School District; that since she is a citizen and educable child it is her father's duty to send her to school and that she desires to attend the Rosedale Consolidated High School; and further that on the opening of the said school she appeared as a pupil but at the noon recess was notified by the Superintendent, Mr. J. H. Nutt, in charge of the school, that she would have to return home and would not be allowed to enter the school, the said Nutt further advising her that an order had been made by the Board of Trustees excluding her from the scchool solely on the ground and

for the reason that she was of Chinese descent, and therefore not a member of the White or Caucasian race, and that the order of the board of trustees had been made in obedience to the instructions of the State Superintendent of Education. The petition further stated that there was no school maintained in the district exclusively for the education of children of Chinese descent and none other in the county which she could attend.

The petition further recites the provisions of the Constitution of the State of Mississippi as to the creation of a common school fund and the distribution thereof among the several counties in proportion to the number of educable children in the counties and as to the maintenance of a uniform system of free public schools for all children between the ages of five and twenty-one years. And further that in obedience to the mandate of the constitution the legislature provided for the establishment of the Rosedale Consolidated High School; and that the father and mother are taxpayers and help support and maintain the schools and that Martha, as an educable child, has the right to attend the school; that the right to attend said school is a valuable right; that she is not a member of the colored race nor of mixed blood but is of pure Chinese origin or descent and a native born citizen of the United States and of the State of Mississippi and of the Rosedale Consolidated High School District and was in every way competent and qualified to attend the said school.

The petition further sets forth that the trustees and the Superinendent of the school and the State Superintendent of Education denied to her the right to attend the school solely and exclusively upon the ground that she is of Chinese descent; that she is hereby discriminated against and denied the valuable right and privilege to whch she is entitled as a citizen of the State of Mississ

ippi; that to exclude her from said school is to deny to her, a native born resident citizen of the United States and of the State of Mississippi privileges and immunities incident to her citizenship; that she is being deprived of this valuable right without process of law and is being denied, on account of her race, the equal protection of the law, contrary to the provisions of the Constitution of the United States and the Constitution of the State of Mississippi.

The petition was filed September 29, 1924, Demurrer was filed, the principal ground of which is "the bill shows on its face that complainant is a member of the Mongolian or Yellow race, and therefore, not entitled to attend the schools provided by law in the State of Mississippi for the children of the white or Caucasian race."

The demurrer was overruled by the trial court and the writ of mandamus was directed to be issued. The Superintendent of Education and the superintendent of the school and the members of the board of trustees appealed to the Supreme Court of Mississippi, where the judgment of the trial court was reversed and the petition dismissed.

ASSIGNED ERRORS MAINLY RELIED UPON

1—(R. 34)

"A child of school age and otherwise qualified and eligible to attend a public school in the school district wherein the child resides under statutes providing for a uniform system of free public schools, is denied the equal protection of the laws when she is excluded from such school solely on the ground that she is a Chinese child and not of the Caucasian race."

111—(R. 35)

"A classification of children for the purpose of regulating public schools which puts the children of one race into a school to themselves and the children of all other races together in another school discriminates unreasonably against the children of the several races placed in the same school. Such classification creates a privilege in one race that is denied to the other races, namely, the privilege of having schools maintained for its exclusive benefit and enjoyment. The enforcecment of such statutory regulations is a denial of the equal protection of the laws to the children of the several races other than the race enjoying the exclusive privilege."

V—(R. 35)

"A taxpayer and citizen having a child of school age and otherwise qualified and eligible to attend a public school maintained in the school district wherein the child resides, under statutes providing for a uniform system of free public schools, is denied the equal protection of the laws when the child is excluded from such school solely on the ground that she is a Chinese child and not of the Caucasian race where no other school with accomodations equal to those of the school from which the child is excluded is maintained which the child might attend."

VI.—(R. 36)

"Gong Lum and Martha Lum, plaintiffs in error, have been denied the equal protection of the laws, as shown by this record, in that the constitution and laws of the State of Mississippi have been so construed and enforced as to uphold a classification of school children for the purpose of organizing and regulating the public

schools of the state which gives to the Caucasian race the exclusive privilege of a school that none but the children of that race may attend and denies the same privilege to the children of other races including the Chinese race to which plaintiffs in error belong; and denies the right of plaintiffs in error to enjoy the privileges of the school that the Caucasian children of the district attend and this too without any showing that there is any other school plaintiffs in error might patronize or attend offering accommodations and opportunities equal to those afforded by the school provided for the Caucasian race."

ARGUMENT

The single question is whether the State of Mississippi has denied to plaintiffs in error the equal protection of the laws in excluding Martha Lum from a public school. We say it has. And we now undertake to support our position, first calling it to this court's attention that there is no issue as to the right of a Chinese child to attend the public schools nor as to this being a valuable right and one of the kind that a state may not deny to one citizen or person within its jurisdiction while extending it to others. The existence of the right and the protection placed about it by the 14th Amendment are assumed and even recognized by the Mississippi Court. That court has only said that on the showing made in the petition for mandamus the right in this instance has not been taken away nor denied.

McFarland vs. Goins, 96 Miss. 76.
Moreau vs. Grandich, 114 Miss. 560.

In the opinion in this case (R 9) the court assumes that Martha Lum possesses the right and that it is one

within the protection of the 14th Amendment. The argument in the opinion is directed to the classification made by the Mississippi Constitution and statutes.

1.

THE CLASSIFICATION

Section 201 of the Mississippi Constitution is as follows:

> "It shall be the duty of the legislature to encourage, by all suitable means, the promotion of intellectual, scientific, moral and agricultural improvement by establishing a uniform system of free public schools, by taxation or otherwise, for all children between the ages of five and twenty-one years, and, as soon as practicable, to establish schools of higher grade."

The petition charges and the demurrer admits that a public school system has been provided and is supported by taxation imposed on all citizens and property alike and that these plaintiffs in error are taxpayers and resident citizens of the school district.

Section 207 of the Constitution reads as follows:

> "Separate schools shall be maintained for children of the white and colored races."

In the opinion in this case the court said (R. 19):

> "In our State no statute has defined the term 'colored race' and considering the policy of the State indicated above we think that the Constitutional Convention used the word' colored' in

the broad sense rather than the restricted sense, its purpose being to provide schools for the White or Caucasian race, to which schools no other race could be admitted, carrying out the broad dominant purpose of preserving the purity and integrity of the White race and its social policy."
And again (R. 20) it is said:

"However, the segregation laws have been so shaped as to show by their terms that it was the White race that was (fol. 31) intended to be separated from the other races. The Legislature has in some of the statutes provided for special schools for the Indian race, and any other race unprovided for, but under the general school laws a number of pupils are required to create one of these special schools..

"The Legislature is not compelled to provide separate schools for each of the colored races and unless and until it does provide such schools and provides for segregation of the other races, such races are entitled to have the benefit of the colored public schools."

Of course it is the white, or Caucasian race, that makes the laws and construes and enforces them. It thinks that in order to protect itself against the infusion of the blood of other races its children must be kept in schools from which other races are excluded. The classification is made for the exclusive benefit of the law-making race. The basic assumption is that if the children of two races associate daily in the school room the two races will at last intermix; that the purity of each is jeopardized by the mingling of the children in the school

room; that such association among children means social intercourse and social equality. This danger, the white race, by its laws, seeks to divert from itself. It levies the taxes on all alike to support a public school system but in the organization of the system it creates its own exclusive schools for its children and other schools for the children of all other races to attend together.

If there is danger in the association it is a danger from which one race is entitled to protection just the same as another. The White race may not legally expose the Yellow race to a danger that the dominant race recognizes and, by the same laws, guards itself against. The White race creates for itself a privilege that it denies to other races; exposes the children of other races to risks and dangers to which it would not expose its own children. This is discrimination.

The following is taken from the opinion of the Missouri Supreme Court in **Lehew vs. Brummell,** 103 Mo. 549, 11 L. R. A. 828-829.

> "The common-school system of this State is a creature of the State Constitution and the laws passed pursuant to its command. The right of children to attend the public schools and of parents to send their children to them is not a privilege or immunity belonging to a citizen of the United States as such. It is a right created by the State, and a right belonging to citizens of this State as such. It therefore follows that the clause in question is without application to the case in hand. We then come to the last clause, which is prohibitory of State action. It says: 'Nor shall any State deny to any person within its jurisdiction the equal protection of the laws.'

Speaking of this clause in its application to State legislation as to colored persons, Justice Strong said: 'What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the State; and, in regard to the colored race, for whose protection the Amendment was primarily designed, that no discrimination shall be made against them by law because of their color.' " Strauder vs. West Virginia, 100 U. D. 313. 25 L. ed. 664.

Again, in the same opinion (p. 830 of 11 L. R. A.) it is said:

> "It is true, Brummell's children must go three and one half miles to reach a colored school, while no white child in the district is required to go further than two miles. The distance which these children must go to reach a colored school is a matter of inconveniecne to them, but it is an inconvenience which must arise in any school system. The law does not undertake to establish a school within a given distance of anyone, white or black. The inequality in distance to be traveled by the children of different families is but an incident to any classification, and furnishes no substantial ground of complaint. People vs. Gallagher, 93 N. Y. 438, 451."

And again in the same opinion (p. 830 of 11 L. R. A.):

> "The fact must be kept in mind, for it lies at the foundation of this controversy, that the laws of this state do not exclude colored children from

the public schools. Such children have all the school advantages and privileges that are afforded white children. The fact that the two races are separated for the purpose of receiving instruction deprived neither of any rights. It is but a reasonable regulation of the exercise of the rights. As said in the case just cited, 'equality, and not identity of privileges and rights, is what is guaranteed to the citizen.' Our conclusion is that the Constitution and laws of the State providing for separate schools for colored children are not forbidden by or in conflict with the 14th Amendment of the Federal Constitution; and the courts of last resort in other states reached the same result. People vs. Gallagher, 93 N. Y. 438; State vs. McCann, 21 Ohio St. 198; Cory vs. Carter, 48 Ind. 328; Ward vs. Flood, 48 Cal. 36. A like result was reached in Massachusetts under a Constitutional provision similar to the 14th Amendment as to the question in hand. Roberts vs. Boston 5 Cush. 198.

We are also of the opinion that our conclusion is in accord with the cases cited from the Supreme Court of the United States, the final arbiter of all such questions."

In **Strauder vs. West Virginia,** 100 U. S. 303, 25 L. Ed. 664, this court had under decision the contention of Strauder that he had not had a fair trial under the State laws that allowed none but white persons to sit on the juries. In discussing the status of the "colored race" (used as synonymous with "Negro race") said:

"This is one of a series of Constitutional provisions having a common purpose, namely, secur-

ing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the Amendments, as we said in the Slaughter House case, 16 Wall. 36 (83 U. S. XXI., 394) cannot be understood without keeping in view the history of the times when they were adopted, the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that, in some states, laws making such discriminations then existed, and others might well be expected. The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States where they were residents."

That the negroes were once slaves and, as a race, had to begin as children, is judicially known, even adjudicated. Laws are upheld that recognize this well-known fact. Because of their racial peculiarities, physcal as well as moral, the white race avoids social rela-

tions wth the members of that race. Such intercourse is objectionable; in many instances would be repulsive and impossible. The White race protects itself against conditions that would require social contact—this, as the Mississippi court says, to preserve the integrity of the Caucasian race. But has not the Chinese citizen the same right to protection that the Caucasian citiizen has? Are they not all equal before the law? Can we say to the Chinese child "you must associate with children of the negro race but we will not allow the same association to our own children?" Can we arrogate to ourselves the superior right to so organize the public school system as to protect our racial integrity without regard to the interests or welfare of citizens of other races?

Color may reasonably be used as a basis for classification only in so far as it indicates a particular race. Race may reasonably be used as a basis. "Colored" describes only one race and that is the negro. State vs Treadway, 126 La. page, 52 So. Page 500; R. C. L. page 655; Lehew vs Brummell Supra. Plessy vs Ferguson, 163 U. S. 537, 41 L. ed. 256; Berea College vs Kentucky, 133 Ky. 209, 13 Ann. Cas. 337 and note page 342. In the Berea college case the following is quoted from West Chester etc. R. R. Co. vs Miles, 55 Pa. St. 209, 93 Am. Dec. 747:

> "The question is one of difference, not of superiority or inferiority. Why the Creator made one black and the other white we know not, but the fact is apparent and the races distinct, each producing its own kind and following the peculiar law of its constitution. Conceding equality with natures as perfect and rights as sacred, yet God has made them dissimilar, with those natural instincts and feeling which he always imparts to his

creators when he intends that they should not overset the natural boundaries he has assigned to them. The natural law which forbids their intermarriage, and that social amalgamation which leads to a corruption of the races, is as clearly divine as that which imparted to them different natures. The tendency of intimate social intermixture is to amalgamation, contrary to the law of races. The separation of the white and black races upon the surface of the globe is a fact equally apparent. Why this is so it is not necessary to speculate, but the fact of a distribution of men by race and color is as visible in the providential arrangement of the earth as that of heat and cold. The natural separation of the races is therefore an undeniable fact, and all social organizations which lead to the amalgamation are repugnant to the law of nature. From social amalgamation it is but a step to illicit intercourse, and but another to intermarriage. But to assert separateness is not to declare inferiority in either; it is not to declcare one a slave, the other a freeman—that would be to draw the illogical sequence of inferiority from difference only. It is simply to say that following the order of Divine Providence, human authority ought not to compel these widely separate races to intermix. The right of such to be free rom social contact is as clear as to be ree from intermarriage. The former may be less repulsive as a condition, but not less entitled to protection as a right. When, therefore, we declare a right to maintain separate relations, so far as is reasonably practicable, but in a spirit of kindness and charity, and with due regard to equality of rights, it is not prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of

races established by the Creator himself, and not to compel them intermix contrary to the instincts"

To the above authorities dealing with instances of classification on the basis of race, and recognizing that "colored race" is synonomous with "negro race," should be added Tucker vs. Blease, 97 S. C. 303, Ann. Cas. 1916C, 796, and the note beginning at page 806. All of these numerous authoritesi uphold a statutory classification that puts the children of one race in a school to themselves. And this is the classification generally adopted, as these same authorities indicate. In fact, it is the only clasification.

If the race of the child is not made the basis of the classification, it is difficult to see what basis could be employed. It would not do to classify them on the color of their hair, or on the shade of their skin, or according to the place of their birth, or according to the property they or their parents own, or according to the taxes paid. The difference between racial characteristics is known. These differences furnish the reasons that support the classification. The habits or customs of life of the members of one race belong, generally speaking, to all the members of that race. They have their own social practices and customs and understand each other. No child can complain that he is required to associate in school with the children of his own race.

But here the State of Mississippi ignores the generally accepted meaning of the word "colored" as denoting a peculiar race, and applies it as a simple adjective describing all persons who do not belong to the white race. It is as if our statutes required the creation of schools for white children exclusively, and other schools

for all other children not classified as white people. If racial differences are let out of the consideration, there is no reasonable basis for the clasification.

It appears, too, from the discussions in the cases and by the note writers that the courts have taken cognizance of the fact that the negro is not desired as a social equal by he members of the white race, and, therefore, the White race has made its laws with a view to preventing such social contact as would have a tendency to foster social relations and social equality. But this same precaution, taken with respect to its own children, is omitted when it comes to dealing with the children of the other races.

In the Plessy Case, 45 La. Ann. 80, 18 L. R. A. 639, in dealing with a race separation statute, the court said:

> "Even were it true that the statute is prompted by prejudice on the part of one race to be thrown in such contact with the other, one would suppose that to be a sufficient reason why the pride and self-respect of the other race should equally prompt it to avoid such contact, if it could be done without the sacrifice of equal accommodations. It is very certain that such unreasonable resistance upon thrusting the company of one race upon the other, with no adequate motive, is calculated, as suggested by Chief Justice Shaw (in 5 Cushing, 198), to foster and intensify the repulsion between them, rather than towards extinguishing it."

The above is repeated here to show that the courts take notice of the undesirability of association with the Negro race, and in support of the contention that the State

when it requires them to aattend school with negro children, or be deprived altogether of the benefits of the public school system.

The characteristic differences between the Chinese race and the negro race are as great as are the differences between the characteristics of the White race and those of the Negro race. The classification cannot be justified, unless the court should find that all races that are not white are so much in harmony in their social habits and customs as to make it proper and satisfactory that they associate under such conditions as may bring about social intercourse and social equality.

Some reasonable basis must be found for laws that apply to certain people, or certain classes, and do not apply to others, or apply differently to others. We say that there is no basis in reason for a classification that puts all children denominated white, or belonging to the White race in one class, and that all others, whatever their color, shall be put in another class. It should be noted that Martha Lum was denied admission to the Rosedale Consoldiated High School on the sole ground that she is a Chinese child. The petition for the writ of mandamus so states, and this is admitted by the demurrer. **She was not excluded on the ground that there was any other school open to her, but solely on the ground that she is not a member of the White race.** The petition expressly open to her, but solely on the ground that she is not a member of the white race. The petition expressly charges (R. p. 2) "that there is no school maintained in the district for the education of children of Chinese descent, and none established in said district or county where she could attend," and again (R. p. 3) "that this is the only school conducted in said district available for her as a pupil." **She was**

denied admission, not because there was another school provided for her, but because she is not a member of the White race."

II.—(ASSIGNED ERROR VI.)

"Gong Lum and Martha Lum, plaintiffs in error have been denied the equal protection of the laws, as shown by this record, in that the constitution and laws of the State of Mississippi have been so construed and enforced as to uphold a classification of school children for the purpose of organizing and regulating the public schools of the state which gives to the Caucasian race the exclusive privilege of a school that none but the children of that race may attend and denies the same privilege to the children of other races including the Chinese race to which plaintiffs in error belong; and denies the right of plaintiffs in error to enjoy the privileges of the school that the Caucasian children of the district attend, and this too without any showing that there is any other school plaintiffs in error might patronize or attend offering accommodations and opportunities equal to those afforded by the school provided for the Caucasian race."

Even if this Court should hold that the classification made by the State of Mississippi, and upheld by our Supreme Court in this case, is a reasonable one, still, we say that on this record these plaintiffs in error have been denied their rights guaranteed to them by the equal protection clause of the 14th Amendment to the Federal Constitution.

Clearly the authoritieis agree that if separate public schools are provided for different classes of children, the children in one class do not enjoy the equal protection of the laws unless the accommodations and facilities af-

forded them in their separate institutions are equal to those furnished other classes in their separate institutions

This case was submitted to the trial court on the petition for mandamus and demurrer thereto. The demurrer is at page 6 of the Record, and the order overruling it at page 7. From the judgment of the trial court overruling the demurrer and directing the issuance of the writ of mandamus as prayed an appeal was prosecuted to the Supreme Court of Mississippi. There is nothing in the record to show that any separate accommodations of any sort had been provided for Chinese children. The petition, on the other hand, avers that "there is no school maintained in the district for the education of children of Chinese descent, and none established in said district or county where she could attend. (R. p. 2). And again the petition charges (R. p. 3) that the Rosedale Consolidated High School "is the only school conducted in said district available for her as a pupil." There is no showing in this record that there was even a negro school within her reach. On the other hand, the record affirmatively shows that there was no other school available to her as a pupil.

But suppose the exclusion of Martha Lum from the Rosedale Consolidated High School had been justified by the school authorities, these defendants in error, in their pleadings, by showing that another school had been provided for Chinese children, or a school provided for colored children, at which Martha should have offered herself as a pupil. Then the question would have been raised whatever the basis of classification, whether the school provided for Martha, and available to her, afforded accommodations equal to those furnished at the school she tried to enter. Then evidence would have been heard on

this question, and the school authorities would have been given the opportunity to show that Martha was provided for equally with the children of the more favored race. But the demurrer to the petition admits that there was no other school that Martha might attend.

It is true the Supreme Court (R. p. 20) said:

> Under our statutes a colored public school exists in every county, and in some convenient district, in which every colored child is entitled to obtain an education. These schools are within the reach of all the children of the state and the plaintiff does not show by her petition that she applied for admission to such school. On the contrary, the petitioner takes the position that because there are no separate public schools for Mongolians, that she is entitled to enter the white public schools in preference to the colored public schools. A consolidated public school in this state is simply a common school conducted as other common schools are conducted, the only distinction being that two or more school districts have been consolidated into one school."

The Supreme Court of Mississippi in making this statement was only speaking generally of the public school system. If the above observations are to be taken as statements of fact, the proof of such facts does not appear in this reccord. Martha could not be excluded from the school she offered to enter, unless another school available to her, furnishing equal accommodations and facilities, was open to her. The turning her away from the Rosedale Consolidated High School can in no way be justified except by proof that there was another school furnishing equal accommodations available to her. Can

a court assume that there was such a school? Can the placing of one class in one school and another class in another school be justified, when questioned, except by showing that the two schools furnish substantially the same accommodations?

The general rule is stated, pp 654-655, 24 R. C. L., as follows:

> "The right to segregate the races for purposes of education does not mean that either may be denied the privilege of attending the public schools. When a uniform system of public schools has been adopted under the authority of the State. Any discrimination in the enjoyment of those privileges on account of race is forbidden by the 'equal protection' clause of the 14th Amendment, and there is no question that a legislature cannot exclude colored children, merely because they are colored, from the benefits of a system o feducation provided for the youth of the state, nor can a school board discriminate against them in exercising the discretion vested in them over school matters. But their rights are amply protected if separate schools of equal merit are maintained for their education. Therefore, where the law provides for separation of the races in education separate schools must be maintained for colored children, and if this is not done, colored children cannot be excluded from the schools kept for white pupils. * * * * Separate schools provided for the education of colored children must be equal in equipment and efficiency to the schools provided for white children."

The defendants in error, defendants in the State Circuit Court, did not plead, in answer to the petition, that Martha Lum should attend some other school provided for her, a school affording equal facilities and opportunities, but filed their demurrer to the petition, which expressly charges that this was the only school in the district available to her as a pupil. Plaintiffs in error in their original petition charged that Martha was excluded solely on the ground that she was a Chinese child, and claimed the protection of the 14th Amendment. The only sufficient answer to this petition would be that another school of equal merit was open and available to Martha.

The Supreme Court of Mississippi does not know whether there is another school open and available to these petitioners. If the claim had been made by the defendants in the trial court that there was such school, then the petitioners would have had an opportunity to try the question as to the kind of school claimed to be open to them. But such other school available to Martha is not shown by any evidence, nor by any pleading.

Then, the case is like this: The petitioners say that the Rosedale Consolidated High School is the only school conducted in said district available for her as a pupil; the defendants admit that this is true by their demurrer. The petitioners charge that the child was turned away from the said school solely because she is a child of Chinese descent; this is admitted by the demurrer. Then the Supreme Court, without any evidence as to the accessibility, or character, or even existence of any other school, says that Martha was properly turned away from the Rosedale Consolidated High School. The Court, in this, not only adopts a classification founded upon color and not upon race, but goes a step farther, and decides,

in the absence of proof, that the classification could be enforced because there was another school provided for children of the Negro race which Martha might attend.

So, we insist that the basis for the classification is unreasonable; and that if we are wrong in this, still, the Supreme Court of Mississippi committed error in entering final judgment and deciding that the right of these plaintiffs in error to attend is all they can ask or demand regardless of the character of such other school.

Respectfully submitted,

J. N. FLOWERS, of Jackson, Miss.,
Attorney for Plaintiffs in Error.

EARL BREWER,
EDWARD C. BREWER, of Clarksdale, Miss.
of Counsel for Plaintiffs in Error.

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. [redacted] 29

GONG LUM and CHEW HOW, next friend for MARTHA LUM,

Plaintiffs in Error.

vs.

G. P. RICE, et al.,

Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

RUSH H. KNOX, Attorney General
of Mississippi.

ATTORNEY FOR DEFENDANTS IN ERROR

E. C. SHARP,
OF COUNSEL.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 811.

GONG LUM and CHEW HOW, next friend for MARTHA LUM,

Plaintiffs in Error.

vs.

G. P. RICE, et al.,

Defendants in Error.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

The issues presented in this cause call for a construction of Section 207 of the Constitution of the State of Mississippi, which is as follows:

> "Separate schools shall be maintained for children of the white and colored races."

And of Section 1 of Article 14 of the Constitution of the United States, which reads:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Also an interpretation or understanding of the words "children of the white race."

If children of Chinese birth are of the white race, the judgment of the Supreme Court of Mississippi should be reversed; otherwise it should be sustained.

Or if it is a violation of the Constitution of the United States to seggregate the races in the public schools of the various states, then Section 207 of the Constitution of Mississippi is repugnant thereto and should be stricken down.

In our presentation of this case we will first discuss what is meant by the "white race" as defined by the Supreme Court of the United States and the courts of last resort of some of the states.

The definition of "white" as applied to the human races, or the rule as to who are included in the term "white race" was first announced, so far as we are able to ascertain, in 1878, in the case of In Re: Ah Yup, Case No. 104, Federal Cases, Volume No. 1 page 223, in which the court said among other things:

> "The questions are: 1. Is a person of the Mongolian race a 'white person' within the meaning of the statute? 2. Do these provisions exclude all but white persons and persons of African nativity or African descent. Words in a statute, other than technical terms, should be taken in their ordinary sense. The words 'white person' as well argued by petitioner's counsel, taken in a strictly literal sense, constitute a very indefinite description of a class of persons, where none can be said to be literally white, and those called

white may be found of every shade from the lightest blonde to the most swarthy brunette. But these words in this coutnry, at least, have undoubtedly acquired a well settled meaning in common popular speech, and they are constantly used in the sense so acquired in the literature of the country, as well as in common parlance. As ordinarily used everywhere in the United States, one would scarcely fail to understand that the party employing the words 'white person' would intend a person of the Caucasian race.

"In speaking of the various classifications of races, Webster in his dictionary says,

> 'The common classification is that of Blumenbach, who makes five. 1 The Caucasian, or white race to which belong the greater part of the European nations and those of Western Asia; 2. The Mongolian, or yellow race, occupying Tartary, China, Japan, etc.; 3. The Ethopian, or Negro (black) race, occupying all Africa, except the north; 4. The American, or red race, containing the Indians of North and South America; and, 5. The Malay, or Brown race, occupying the islands of the Indian Archipelago,' etc.

This division was adopted from Buffon, with some changes in names, and is founded on the combined characteristics of complexion, hair and skull. Linnaeus makes four divisions, founded on the color of the skin: '1. European, whitish; 2. American, coppery; 3. Asiatic, tawny; and, 4. African, black'. Cuvier makes three: Caucasian, Mongol, and Negro. Others make many more, but no one includes the white, or Caucasian, with the Mongolian or yellow race; and no one of those classifications recognizing color as one of

the distinguishing characteristics includes the Mongolian in the white or whitish race."

"Neither in popular language, in literature, nor in scientific nomenclature, do we ordinarily, if ever, find the words 'white person' used in a sense so comprehensive as to include an individual of the Mongolian race. Yet, in all, color, notwithstanding its indefiniteness as a word of description, is made an important factor in the basis adopted in the distinction and classification of races. I am not aware that the term 'white person,' as used in the statutes as they have stood from 1802 till the late revision, was ever supposed to include a Mongolian. While I find nothing in the history of the country in common or scientific usage, or in Legislative proceedings, to indicate that congress intended to include in the term 'white person' any other than an individual of the Caucasian race, I do find much in the proceedings of congress to show that it was universally understood in that body, in its recent legislation, that it excluded Mongolians."

The opinion then refers to proceedings in congress at the time of the enactment of the present naturalization laws, and says:

"It is clear from these proceedings that congress retained the word 'white' in the naturalization laws for the sole purpose of excluding the Chinese from the right of naturalization."

After the discussion of the proceedings, the court said:

"Thus, whatever latitudinarian construction might otherwise have been given to the term 'white

person' it is entirely clear that congress intended by this legislation to exclude Mongolians from the right of naturalization. I am, therefore, of the opinion that a native of China, of the Mongolian race, is not a white person within the meaning of the act of congress."

The rule announced in the case of Ah Yup, supra, has been consistently followed and adhered to by this court and a number of other courts of last resort since that time.

The most recent decisions of this court on the subject are the cases of Ozawa vs. United States 260 U. S. 178, 67 L. Ed 199; and Yamashita vs. Hinkle, 260 U. S. 198, 67 Law Ed. 209.

In the Ozawa case, supra, the court said:

"On behalf of the appellant it is urged that we should give to this phrase the meaning which it had in the minds of its original framers in 1790, and that it was employed by them for the sole purpose of excluding the black or African race and the Indians, then inhabiting this country. It may be true that these two races were alone thought of as being excluded, but to say that they were the only ones within the intent of the statute would be to ignore the afirmative form of the legislation. The provision is not that the negroes and Indians shall be excluded, but it is, in effect, that only free white persons shall be included. The intention was to confer the privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny it to all who could not be so classified. It is not enough to say that the framers did not have in mind the brown or yellow races of Asia. It is nec-

essary to go farther and be able to say that, had these particular races been suggested, the language of the acts would have been so varied as to include these within its privileges. As said by Chief Justice Marshall in Dartmouth College vs. Woodward, 4 Wheat, 518, 664, 4 L. Ed. 629, 661, in deciding a question of constitutional construction: 'It is enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous, or repugnant to the general spirit of the instrument as to justify those who expound the constitution in making it an exception.' If it be assumed that the opinion of the framers was that the only person who would fall outside the designation 'white' were negroes and Indians, this would go no farther than to demonstrate their lack of sufficient information to enable them to foresee precisely who would be excluded by that term in the subsequent administration of the statute. It is not important, in construing their words, to consider the extent of their ethnological knowledge, or whether they thought that, under the statute, the only persons who would be denied naturalization would be negroes and Indians. It is sufficient to ascertain whom they intended to include; and, having ascertained that, it follows, as a necessary corollary, that all others are to be excluded.

"The question is, then, 'Who are comprehended within the phrase "free white persons"?' Undoubtedly the word 'free' was originally used in recognition

of the fact that slavery then existed, and that some white persons occupied that status. The word, however, has long since ceased to have any practical significance and may now be disregarded.

"We have been furnished with elaborate briefs in which the meaning of the words 'white persons' is discussed with ability and at length, both from this standpoint of judicial decision and from that of the science of ethnology. It does not seem to us necessary, however, to follow counsel in their extensive researches in these fields. It is sufficient to note the fact that these decisions are in substance, to the effect that the words import a racial and not an individual test, and with this conclusion, fortfied as it is by reason and authority, we entirely agree. Manifestly the test afforded by the mere color of the skin each individual is impracticable, as that differs greatly among persons of the same race, even among Anglo-Saxons, ranging by imperceptible gradations from the fair blonde to the swarthy brunette, the latter being darker than many of the lighter hued persons of the brown or yellow races. Hence to adopt the color test alone would result in a confused overlapping of races and a gradual merging of one into the other, without any practical line of separation. Beginning with the decision of Circuit Judge Sawyer, in Re Ah Yup, (1878) 5 Sawy. 155, Fed. Cas. No. 104, the Federal and state courts in an almost unbroken line have held that the words 'white person' were meant to indicate only a person of what is popularly known as the Caucasian race. Among these decisions, see, for example: Re: Camille, 6 Sawy. 541, 6 Fed. 256, Re: Saito, 62 Fed. 126; Re: Nian, 6 Utah, 259, 4 L. R. A. 726, 21 Pac. 993; Re: Kumagai, 163 Fed. 922; Re Yamashita, 30 Wash. 234, 227 L. R. A. 761, 94 Am. St. Rep. 860, 70 Pac. 482, Re Ellis, 179 Fed. 1002; Re Mozunder, 207 Fed. 115, 117, Re Singh,

257 Fed. 209, 211, 212; and Re Charr, 273 Fed. 207. With the conclusion reached in these several decisions we see no reason to differ. Moreover, that conclusion has become so well established by judicial and executive concurrence and legislative acquiescence that we should not, at this late day, feel at liberty to disturb it, in the absence of reasons far more cogent than any that have been suggested. United States vs. Midwest Oil Co. 236 U. S. 459, 472, 59 L. Ed. 673, 680; 35 Sup. Ct. Rep. 309.

"The determination that the words 'white person' are synonymous with the words 'a person of the Caucasian race' simplifies the problem, although it does not entirely dispose of it. Controversies have arisen and will no doubt arise again in respect of the proper classification of individuals in border-line cases. The effect of the conclusion that the words 'white person' means a Caucasian is not to establish a sharp line of demarcation between those who are entitled and those who are not entitled to naturalization, but rather a zone of more or less debtable ground outside of which, upon the one hand are those clearly eligible, and outside of which upon the other hand, are those clearly ineligible for citizenship. Individual cases falling within this zone must be determined as they arise from time to time by what this Court has called in another connection (Davidson vs. New Orleans, 96 U. S. 97, 24 L. Ed. 616, 619,) 'the gradual process of judicial inclusion and exclusion.'

"The appellant in the case now under consideration, however, is clearly of a race which is not Caucasian, and therefore, belongs entirely outside the zone on the negative side. A large number of Federal and State courts have so decided, and we find no reported case definitely to the contrary. These decisions are

sustained by numerous scientific authorities which we do not deem it necessary to review. We think these decisions are right, and so hold."

In the opinion in Yamashita vs. Hinkle, 260 U. S. 198, 67 L. Ed. 209, the appellant was of the Japanese race, born in Japan, and the Court said:

> "Upon the authority of Ozawa vs. United States, supra, we must hold that the petitioners were not eligible to naturalization, and as this ineligibility appeared upon the face of the judgment of the superior court, admitting petitioners to citizenship, that court was without jurisdiction."

It appears from the cases above cited that the decisions of the Federal Court have been unanimous in holding for many years that the term or phrase "white person" only includes members of the white race. This brings us then to the question of whether or not section 207 of the Constitution of the State of Mississippi authorizes or permits the exclusion of children of Chinese descent from admission into the white public schools of the state, and whether or not the same is repugnant to the Constitution of the United States.

MAY THE RACES BE SEPARATED?

> "Because a state cannot exclude colored children from its public schools, it does not necessarily follow that statutes requiring separate schools for white and colored pupils are unconstitutional. Equality of rights does not involve the necessity of educating the children of different races in the same schools; in other words, equality of rights does not of necessity imply identity of rights, hence it has been held in a large

number of jurisdictions that statutes requiring or permitting the establishment of separate but equally advantageous schools for the education of the children of different races are not unconstitutional."

In support of this ruling we call the Court's attention to the case of Cummings vs. Board of Education, 175 U. S. 528, 44 L. Ed. 262, in which the court said:

"We may add that while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land."

In the same decision the Court further said:

"If, in some appropriate proceeding instituted directly for that purpose, the plaintiffs had sought to compel the board of education, out of the funds in its hands or under its control, to establish and maintain a high school for colored children, and if it appeared that the board's refusal to maintain such a school was in fact an abuse of its discretion and in hostility to the colored population because of their race, different questions might have arisen in the state court."

See also Maddox vs. Neal, 45 Ark. 121, 55 Am. Reps. 540; Ward vs. Flood, 48 Cal. 50, 17 Am. Rep. 405; Wysinger vs. Crookshank, 82 Cal. 588; 23 Pac. 54.

In the case of Reynolds vs. Board of Education, 66 Kan. 687, 72 Pac. 274, the Court in construing and discussing Section 2 of Article 6 of the Constitution of Kansas, which is very similar to Section 207 of the Constitution of the State of Mississippi, said:

> "It is perfectly plain, however, that a uniform system of schools, means uniform educational facilities. Such facilities may be maintained with great simplicity of organization in sparsely settled regions, while the most elaborate machinery is necessary to meet the requirements of dense populations in cities. The system of schools, however, is uniform Divisions and classifications of children in various respects may be necessary in the city and not in the country in order to obtain the best results from the facilities afforded. The facilities themselves, however, remain uniform. The system of educational opportunities, advantages, methods and accommodations is uniform, constant and equal, whether availed of by children in a rural district or a city ward; whether by males or females; whether by blacks and whites commingling, or by them separately; and whether race classification be made in one grade, or department, or city, or county, or in many."

The Court in this case quotes from Cory et al vs. Carter, 48 Ind. 327, 358, 17 Am. Rep. 738, in which that Court said:

> " 'Under our constitution, our common-school system must be general. That is, it must extend over and embrace every portion of the state. It must be uniform. The uniformity required has reference to the mode of government and discipline, the branches

of learning taught, and the qualifications as to age and advancement in learning required of pupils as conditions of their admission. It does not mean that all the schools shall be of the same size and grade, or that all the branches of learning taught in one school shall be taught in all other schools, or that the qualifications as to age and advancement, which would admit a pupil in one school, would entitle such pupil to admission into all the other schools. Uniformity will be secured when all the schools of the same grade have the same system of government and discipline, the same branches of learning taught, and the same qualifications for admission'.

"The word 'common' as applied to the system of schools to be established under the constitution clearly refers to grade. A distinction is made between 'common schools' and 'schools of a higher grade.' But if the definition of the plaintiff be adopted the constitution is not violated by the separation of races in the schools. * * *

" 'This being settled, what is there to prevent the classification of children, equally entitled to the privilege of the system of common schools, with reference to difference of race and color, if the judgment of the legislature should hold such a classification to be most promotive of, or conducive to, the good order and discipline of the schools in the system and the interest of the public. . . .

" 'It being settled that the legislature must provide for the education of the colored children as well as for the white children, we are required to determine whether the legislature may classify such children, by color or race, and provide for their education in separate schools, or whether they must attend the same

school without reference to race or color. In our opinion, the classification of scholars, on the basis of race or color, and their education in separate schools, involve questions of domestic policy which are within the legislative discretion and control, and do not amount to an exclusion of either class. In other words, the placing of the white children of the state in one class and the negro children of the state in another class, and requiring these classes to be taught separately, provision being made for their education in the same branches, according to age, capacity, or advancement, with capable teachers, and to the extent of their pro rata share in the school revenue, does not amount to a denial of equal privileges to either, or conflict with the open character of the system required by the constitution."

In the case of People, ex rel. Cisco, vs. School Board, 161 N. Y. 598, 56 N. E. 81, 48 L. R. A. 115, the Court said:

"It is said that the present constitution requires the legislature to provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated, and therefore the school board was required to admit to any school under its control all the children who desired to attend that particular school. Such a construction of the constitution would not only render the school system utterly impracticable, but no such purpose was ever intended. There is nothing in that provision of the constitution which justifies any such claim. The most that the constitution requires the legislature to do is to furnish a system of common schools where each and every child may be educated; not that all must be educated in any one school, but that it shall provide or furnish a school or schools where each and all may

have the advantages guaranteed by that instrument. If the legislature determined that it was wise for one class of pupils to be educated by themselves, there is nothing in the constitution to deprive it of the right to so provide. It was the facilities for and the advantages of an education that it was required to furnish to all the children, and not that it should provide for them any particular class of associates while such education was being obtained. In this case, there is no claim that the relator's children were excluded from the common schools of the borough, but the claim is that they were excluded from one or more particular schools which they desired to attend, and that they possessed the legal right to attend those schools, although they were given equal accommodations and advantages in another and separate school. We find nothing in the constitution which deprived the school board of the proper management of the schools in its charge, or from determining where different classes of pupils should be educated, always providing, however, that the accommodations and facilities were equal for all. Nor is there anything in this provision of the constitution which prevented the legislature from exercising its discretion as to the best method of educating the different classes of children in the state, whether it related to separate classes, as determined by nationality, color, or ability, so long as it provides for all alike in the character and extent of the education which it furnished and the facilities for its acquirement."

In the case of Roberts vs. City of Boston, 5 Cush. (Mass.) 198, 206, 208, 209, decided in 1848, it is declared that the principle of equality is no wise violated by the establishment of separate schools, saying,

"The great principle, advanced by the learned and eloquent advocate of the plaintiff, is, that by the con-

stitution and laws of Massachusetts, all persons without distinction of age or sex, birth or color, origin or condition, are equal before the law. This, as a broad general principle, such as ought to appear in a declaration of rights, is perfectly sound; it is not only expressed in terms, but pervades and animates the whole spirit of our constitution of free government. But, when this great principle comes to be applied to the actual and various conditions of perosns in society, it will not warrant the assertion, that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security. What those rights are to which individuals, in the infinite variety of circumstances by which they are surrounded in society, are entitled, must depend on laws adapted to their respective relations and conditions.

"Conceding, therefore, in the fullest manner, that colored persons, the descendants of Africans, are entitled by law, in this commonwealth, to equal rights, constitutional and political, civil and social, the question then arises, whether the regulations in question, which provides separate schools for colored children, is a violation of any of these rights. . . .

"The power of general superintendence vests a plenary authority in the committee to arrange, classify and distribute pupils, in such a manner as they think best adapted to their general proficiency and welfare. If it thought expedient to provide for very young children, it may be, that such schools may be kept exclusively by female teachers, quite adequate to their instruc-

tion, and yet whose service may be obtained at a cost much lower than that of more highly qualified male instructors. . . . .

"The committee, apparently upon great deliberation, have come to the conclusion, that the good of both classes of schols will be best promoted, by maintaining the separate primary schools for colored and for white children, and we can perceive no ground to doubt, that this is the honest result of their experience and judgment.

"It is urged, that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted prejudice public opinion. This prejudice, if it exists, is not created by law, and probably cannot be changed by law. Whether this distinction and prejudice, existing in the opinion and feelings of the community, would not be as effectually fostered by compelling colored and white children to associate together in the same schools, may well be doubted; at all events, it is a fair and proper question for the committee to consider and decide upon, having in view the best interests of both classes of children placed under their superintendence, and we cannot say, that their decision upon it is not founded on just grounds of reason and experience, and in the results of a discriminating and honest judgment."

In the case of State, ex rel. Garnes vs. McCann et al., 21 Ohio St. 198, 210, the Court said:

"Conceding that the fourteenth amendment not only provides equal securities for all, but guarantees equality of rights to the citizens of the United States, it remains to be seen whether this privilege has been abridged in the case before us. The law in question

surely does not attempt to deprive colored persons of any rights. On the contrary it recognizes their right, under the constitution of the state, to equal common-school advantages, and secured to them their equal proportion of the school fund. It only regulated the mode and manner in which this right shall be enjoyed by classes of persons. The regulation of this right arises from the necessity of the case. Undoubtedly it should be done in a manner to promote the best interests of all. But this task must, of necessity, be left to the wisdom and discretion of some proper authority. The people have committed it to the general assembly, and the presumption is that it has discharged its duty in accordance with the best interests of all. At all events, the legislative action is conclusive, unless it clearly infringes the provisions of the constitution.

"At most the fourteenth amendment only affords to colored citizens an additional guaranty of equality of rights to that already secured by the constitution of the state.

"The question, therefore, under consideration is the same that has, as we have seen, been heretofore determined in this state, that a classification of the youth of the state for school purposes, upon any basis which does not exclude either class from equal school advantages, is no infringement of the equal rights of citizens secured by the constitution of the state.

"We have seen that the law, in the case before us, works no substantial inequality of school privileges between the children of both classes in the locality of the parties. Under the lawful regulation of equal educational privileges, the children of each class are required to attend the school provided for them, and to which they are assigned by those having the lawful

official control of all. The Plaintiff, then, cannot claim that his privileges are abridged on the ground of inequality of school advantages for his children. Nor can de dictate where his children shall be instructed, or what teacher shall perform that office, without obtaining privileges not enjoyed by white citizens. Equality of rights does not involve the necessity of educating white and colored persons in the same school, any more than it does that of educating children of both sexes in the same school, or that different grades of scholars must be kept in the same school. Any classification which preserves substantially equal school advantages is not prohibited by either the state or federal constitution, nor would it contravene the provisions of either. There is, then, no ground upon which the plaintiff can claim that his rights under the fourteenth amendment have been infringed."

Again, in the case of People, ex rel. King vs. Gallagher, 93 N. Y. 438, 447, 45 Am. Rep. 232, the opinion says:

"It is believed that this provision will be given its full scope and effect when it is so construed as to secure to all citizens, wherever domiciled, equal protection under the laws and enjoyment of those privileges which belong as of right to each individual citizen. This right, as affected by the questions in this case, in its fullest sense, is the privilege of obtaining an education under the same advantages and with equal facilities for its acquisition with those enjoyed by any other individual. It is not believed that these provisions were intended to regulate or interfere with the social standing or rivileges of the citizens, or to have any other effect than to give to all, without respect to color, age or sex, the same legal rights and the uniform protection of the same law.

"When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it is organized and performed all of the functions respecting social advantages with which it is endowed.

"The design of the common-school system of the state is to instruct the citizen, and where for this purpose they have placed within his reach equal means af acquiring an education with other persons, they have discharged their duty to him, and he has received all that he is entitled to ask of the government with respect to such privileges. The question as to how far he will avail himself of those advantages, or, having done so, the use which he will make of his acquirements, must necessarily be left to the action of the individual. . .

"If the right, therefore, of school authorities to discriminate, in the exercise of their discretion, so as the methods of education to be pursued with different classes of pupils be conceded, how can it be argued that they have not the power, in the best interests of education, to cause different races and nationalities, whose requirements are manifestly different, to be educated in separate places. We cannot see why the establishment of separate institutions for the education and benefits of different races should be held any more to imply the inferiority of one race than that of the other, and no ground for such an implication exists in the act of discrimination itself. . . .

"A natural distinction exists between these races which was not created neither can it be abrogated by law, and legislation which recognizes this distinction and provides for the peculiar wants or conditions of

the particular race can in no just sense be called a discrimination against such race or an abridgment of its civil rights. . .

"The right of the individual, as affected by the question in hand, is to secure equal advantages in obtaining an education at the public expense, and where that privilege is afforded him by the school authorities, he cannot justly claim that his educational privileges have been abridged, although such privileges are not accorded him at the precise place where he most desires to receive them."

To the same effect is Ward vs. Flood, 48 Cal. 36, 17 Am. Rep. 405, and as said by the Court in Reynolds vs. Board of Education, 66 Kansas, 722:

"The fact that laws of this character have been in force for many years in many states and in the district of Columbia, and that no question as to their validity has ever been presented to the supreme court of the United States, discloses a remarkable consensus of opinion on the part of the bar of the country as to the result of such an appeal. A statute of the state of Louisiana required railway companies carrying passengers in their coaches in that state to provide equal but separate, accommodations for the white and colored races, by providing two or more passenger coaches for each passenger-train, or by dividing the passenger-coaches by a partition so as to secure separate accommodations. In affirming the constitutionality of this law, the supreme court of the United States sustained its opinion by citing the decisions of the state courts upon the question under discussion, and said:

" 'The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of states where the political rights of th colored race have been longest and most earnestly enforced'." (Plessy vs. Ferguson, 163 U. S. 537, 544, 16 Sup. Ct. 1138, 41 L. Ed. 256.)

And in concluding the opinion in the case of Reynolds vs. Board of Education, supra, the Court said:

"The act of the legislature of 1879 providing for the education of white and colored children in separate schools of cities of the first class, except in the high school, is therefore, in all respects constitutional and valid."

As was said in the case of Berea College vs. Commonwealth, 123 Ky. 209, 13 Am. and Eng. Ann. Cas. 337:

"There exists in each race a homogenesis by which it will perpetually reproduce itself, if unadulterated. Its instinct is gregarious. As a check, there is an-

other, an antipathy to other races, which some call race prejudice. This is nature's guard to prevent amalgamation of the races. A disregard of this antipathy to the point of mating between the races is unnatural and begets a resentment in the normal mind. It is incompatible to the continued being of the races, and is repugnant to their instincts. So such mating is universally regarded with disfavor. In the lower animals this quality may be more effective in the preservation of distinct breeds. But among men conventional decrees in the form of governmental prescripts are resorted to in aid of right conduct to preserve the purity of blood. No higher welfare of society can be thought of than the preservation of the best qualities of manhood of all its races. If, then, it is a legitimate exercise of the police power of government to prevent the mixing of the races in cross-breeding, it would seem to be equally within the same power to regulate that character of association which tends to a breach of the main desideratum—the purity of racial blood. * * *

"That much bitterness has appeared, and some oppression has been practiced, are among the inevitable attendants upon the adjustments by people of different races of the rights justly belonging to each. Clashing of antipathies resulting in outbreaks of violence tends to disturb the public peace, threatens the public safety, and so disrupts the serenity of common purpose to promote the welfare of all the people, that the question is become one of the first importance to the section where the two races live in the greatest numbers. That it is well within the police power of government to legislate upon this question so far as to repress such outbreaks and to prevent disturbances of the public tranquility, we have no sort of doubt. . . . .

"Is not this situation one, if ever there was one,

which calls for and amply justifies the exercise of police power of the government? Or should this irritating cause be left without restraint or control, till by the exhaustion of one side or the other it is settled by the sheer force of superiority of numbers or physical power? It is idle to talk of controlling ideas by legislation, or even by force. You cannot bind an idea by a statute. The attempt should be made, and we believe is being made in good faith, to so control this situation through the law that neither race can have just cause for camplaint; so that each may have e lawful privilege and right that the other has; so that equality of rights before the law shall be a fact, as well as a high-sounding theory; yet so as to conserve th very best of the characteristics of each race, to develop its idea of morality, its thrift, independence, and usefulness. Observation and study at close hand of both the theory and practical working of this problem of social existence, of the collaboration of two races different as the white and black in the same state upon a plane of legal equality, where the government is by the people for the people, it has been found, so the legislative department declared, as evinced by the public policy indicated by the statutes discussed in this opinion, that at the very bottom of all the trouble is the racial antipathy to the destruction of its own identity, and that, if the danger is removed, the friction practically disappears. A separation of the race under certain conditions is therefore enforced, where it is believed that their mingling would tend to produce the very condition which is found it lies at the base of the trouble. In its application it becomes all the more necessary that the overmastering principles included in the police power of the government be firmly recognized, so that a clashing of race prejudices or race destruction, may be lawfully averted."

The same opinion quotes with approval the case of Westchester, etc. Railroad vs. Miles, 55 Pa. St. 209, 93 Am. Dec. 747, in which the Court said:

> " 'The danger to the peace engendered by the feeling of aversion between individuals of the different races cannot be denied. It is the fact with which the company must deal. If a negro takes his seat beside a white man or his wife or daughter, the law cannot repress the anger or conquer the feeling of aversion which some will feel. However unwise it may be to indulge the feeling, human infirmity is not always proof against it. It is much wiser to avert the consequences of this repulsion of race by separation, than to punish afterwards the breach of the peace it may have caused. . . . The right to separate being clear in proper cases, and it being the subject of sound regulation, the question remaining to be considered is whether there is such a difference between the white and black races within this state, resulting from nature, law, and custom, as makes it a reasonable ground of separation. The question is one of difference, not of superiority or inferiority. Why the Creator made one black and the other white we know not, but the fact is apparent and the races distinct, each producing its own kind and following the peculiar law of its constitution. Conceding equality, with natures as perfect and rights as sacred, yet God has made them dissimilar, with those natural instincts and feeling which he always imparts to his creatures when he intends that they shall not overstep the natural boundaries he has assigned to them. The natural law which forbids their intermarriage, and that social amalgamation which leads to a corruption of the races, is as clearly divine as that which imparted to them different natures. The tendency of intimate social intermixture is to amalgamation, contrary to the law of

races. The separation of the white and black races upon the surface of the globe is a fact equally apparent. Why this is so it is not necessary to speculate, but the fact of a distribution of men by race and color is as visible in the providential arrangement of the earth as that of heat and cold. The natural separation of the races is therefore an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature. From social amalgamation it is but a step to illicit intercourse, and but another to intermarriage. But to assert separateness is not to declare inferiority in either; it is not to declare one a slave and the other a freeman—that would be to draw the illogical sequence of inferiority from difference only. It is simply to say that following the order of Divine Providence, human authority ought not to compel these widely separate races to intermix. The right of such to be free from social contact is as clear as to be free from intermarriage. The former may be less repulsive as a condition, but not less entitled to protection as a right. When, therefore, we declare a right to maintain separate relations, so far as is reasonably practicable, but in a spirit of kindness and charity, and with due regard to equality of rights, it is not prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races estbalished by the Creator himself, and not to compel them to intermix contrary to their instincts'."

In the Berea College case, supra, the Court also said:

"While such enforced association is more easily distinguished as falling within the power, yet the main idea is that such association at all, under certain conditions, leads to the main evil, which is amalgamation of the races, and incidentally to conflicts between their members naturally engendered by too close personal contact under conditions which are bound to ex-

cite prejudices and race animosities. If such evils fall within the police power to prevent, then whatever naturally contributes to them may also be regulated, provided the regulation is itself reasonable. The act in question is within the legitimate exercise of the police power of the state, provided it is not so unreasonable in its provisions as to be oppressive and obnoxious to the limitations of the power."

And to the same effect is the following extract of the opinion in the case of Plessy vs. Ferguson, 163 U. S. 537, cited above.

"So far, then, as a conflict with the 14th Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances 'is unreasonable or more obnoxious to the 14th Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of the state legislature.

"We consider the underlying falacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely be-

cause the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet on terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. As was said by the court of appeals of New York in People v. Callagher, 93 N. Y. 438, 448, (45 Am. Rep. 232) 'this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it is organized and performed all of the functions respecting social advantages with which it is endowed.' Legislation is powerless to eradicate racial instincts or differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."

The laws of Mississippi have distinguished between the

negro race and the white race and have also classified the Chinese, and in this classification we must presume that the Legislature was guided and governed by conditions then existing in the State of Mississippi, and that the legislation was enacted in good faith and for the purpose of preserving the integrity of the race and for the promotion of the peace and welfare of the community. We must also presume that when section 207 of the state constitution was adopted, that the framers thereof used the words "white" and "colored" races in the legal acceptation of the term and were not unfamiliar with the decision of the court in the case of Ah Yup, supra, and the other decisions of this Court. This presumption is strengthened when we take into consideration the fact that the Constitutional Convention which adopted the Constitution of Mississippi of 1890, which enacted the section in question, was composed of many of the ablest lawyers of the state.

In 1892, which was two years after the adoption of the Constitution in question, the Legislature by the enactment of section 2859 of the Code of 1892 classified the Mongolian race and drew the distinction between the use of the word "negro" and "colored"; said section being as follows:

> "The marriage of a white person and a negro or mulatto, or person who shall have one-eighth or more of negro blood; or with a Mongolian, or a person who shall have one-eighth or more of Mongolian blood, shall be unlawful, and such marriage shall be unlawful and void and any party thereto, on conviction, shall be punished as for a marriage within the degree prohibited by the last two sections; and any attempt to evade this and the two preceding sections by marrying out of this state and returning to it shall be within them."

This statute was re-enacted and re-adopted in the Code of 1906, being section 3244 thereof.

As was said by the Supreme Court of Mississippi in the case of Rice vs. Gong Lum, 139 Miss. 760,

> "It will also be noted that section 207 of the Constitution, instead of using the word "negro" or having a specific quantity of negro blood, uses the word "colored" in describing the opposite races from the white race.
>
> "In section 2859, Code of 1892, enacted just two years after the Constitution of 1890 was adopted, the legislature prohibited marriages between the white and Mongolian races, and between persons of the white race and persons having one-eighth or more of Mongolian blood. The same section also prohibited intermarriage between persons of the white race with those of negro blood or one-eighth negro blood, the prohibition with reference to marriages being identical in each case as to the negro and Mongolian races.
>
> "It shall be noted further that neither section 263 of the Constitution nor section 2859 of the Code of 1892, which statute has been constantly in force since that date, prohibits any marriage or social relations between the negro and Mongolian races, and they are left free to maintain such social, including marriage, relations as they see proper to enter into.
>
> "Why did the Constitution use the term "negro" in one section and the term "colored" in the other section?
>
> "To all persons acquainted with the social conditions of this state and of the Southern states generally,

it is well known that it is the earnest desire of the white race to preserve its racial integrity and purity, and to maintain the purity of the social relations as far as it can be done by law. It is known that the dominant purpose of the two sections of the Constitution of our state was to preserve the integrity and purity of the white race. When the public school system was being created it was intended that the white race should be separated from all other races. It is true that the negro race was the only race of consequence so far as numbers were concerned. There were then some other races living within the state, of course. So far as we have been able to find, the word 'white,' when used in describing the race, is limited strictly to the Caucasian race, while the word 'colored' is not strictly limited to negroes or persons having negro blood." . . . . . .

"As shown by the above definitions the term 'white' as used in section 207 of our Constitution is limited to the Caucasian race. We have found no definition to the contrary except where it was a legislative definition embraced either in a statute or a constitution. Some of states have statutory definitions that make the term 'white race' include other races. But when no such statutory definition exists all the authorities hold that the term 'white' as applied to race does not embrace any other than the Caucasian. On the other hand, the term 'colored,' as applied to race, may include any race other than the Caucasian or white race. * * * * *

"In our state no statute has defined the term 'colored race,' and, considering the policy of the state indicated above, we think that the constitutional convention used the word 'colored' in the broad sense rather than the restricted sense; its purpose being to provide

schools for the white or Caucasian race, to which school no other race could be admitted, carrying out the broad dominant purpose of preserving the purity and integrity of the white race and its social policy." * * *

"We must construe the Constitution so as to give effect to the intention of its makers. Taking all of the provisions of the law together, it is manifest that it is the policy of this state to have and maintain separate schools and other places of association for the races so as to prevent race amalgamation.

"Race amalgamation has been frowned upon by Southern civilization always, and our people have always been of the opinion that it was better for all races to preserve their purity. * * * *

"The legislature is not compelled to provide separate schools for each of the colored races, and, unless and until it does provide such schools and provide for segregation of the other races, such races are entitled to have the benefit of the colored public schools. Under our statutes a colored public school exists in every county and in some convenient district in which every colored child is entitled to obtain an education. These schools are within the reach of all the children of the state, and the plaintiff does not show by her petition that she applied for admission to such schools. On the contrary the petitioner takes the position that because there are no separate public schools for Mongolians that she is entitled to enter the white public schools in preference to the colored public schools."

In the case of Cory vs. Carter, 48 Ind. 327, 17 Am. Rep. 738, the court said:

"The question is, therefore, squarely presented whether the children and grandchildren of the appellee were entitled to be admitted and taught in the same

school with the white children of the district. The legislature has provided that a separate school shall be provided in each district for the education of the colored children therein, where there is a deficiency of colored children to form one district, several districts shall be consolidated. But if separate schools cannot be provided for the colored children on account of the smallness of the number of such children, then such other provision is to be made by the trustee for their education as the means in his hands will enable him to do.

"The legislature has not pointed out or defined what other means shall be provided. There being no averment that the trustee has failed to provide for the education of the children and grandchildren of the appellee, outside of the school for white children, no question arises as to what would be a compliance with such requirement. But if such allegation had been made, it would not have entitled the children and grandchildren of appellee to admission into the white schools, because the legislature has not provided for the admission of colored children into the same schools with the white children in any contingency; and even if, for the sake of the argument, we were to concede that colored children are, under and by force of the fourteenth amendment, so entitled, the courts cannot, in the absence of legislative authority, confer that right upon them. The legislature has declared that when schools cannot be provided for the colored children, the trustee shall provide such other means for their education as will use up their full share, according to number, of the school revenue. If the trustee fails in the discharge of this duty, he may be compelled by mandate to discharge the duty imposed upon him by law.

"The action of congress, at the same session at which the fourteenth amendment was proposed to the States, and at a session subsequent to the date of its ratification, is worthy of consideration as evincing the concurrent and after-matured conviction of that body that there was nothing whatever in the amendment which prevented congress from separating the white and colored races, and placing them, as classed, in different schools, and that such separation was highly proper and conducive to the well-being of the races, and calculated to secure the peace, harmony, and welfare of the public ;and if no obligation was expected to be or was imposed upon congress by the amendment, to place the two races and colors in the same school, with what show of reason can it be pretended that it has such a compelling power upon the sovereign and independent States forming the Federal Union?"

In the case of Lehew vs. Brummell, 103 Mo. 546, 23 Am. St. Rep. 895, 15 S. W. 765, referred to in the brief of plaintiff in error, we desire to call the Court's attention to the following quotation from said opinion:

"The clause which declares that all persons born or naturalized in the United States are citizens of the United States, and of the state wherein they reside, can have no application to the case in hand further than this, that it points out and makes a distinction between citizenship of the United States and citizenship of a State. The next clause ordains that no state shall make or enforce any law which shall abridge the privileges or immunities of a citizen of the United States. The distinction just mentioned is carried into this provision, whch relates, and relates only, to privileges and immunities of a citizezn of the United States as distinguished from the privileges and immunities of a citizen of a state: Slaughter-House

Cases, 16 Wall. 74; Bradwell vs. State, 16 Wall. 130.

"The common school system of this state is a creature of the state constitution and the laws passed pursuant to its command. The right of children to attend the public schools, and of parents to send their children to them, is not a privilege or immunity belonging to a citizen of the United States, as such. It is a right created by the state, and a right belonging to citizens of this state, as such. It therefore follows that the clause in question is without application to the case in hand." * * * *

We then come to the simple question, whether our Constitution, and the statutes passed pursuant to it, requiring colored persons to attend schools established and maintained at public expense, for the education of colored persons only, deny to such persons 'equal protection of the laws.'

"It is to be observed, in the first place, that these persons are not denied the advantages of the public schools. The right to attend such schools and receive instruction thereat is guaranteed them. The framers of the constitution, and the people by their votes in adopting it, it is true, were of the opinion that it would be better to establish and maintain separate schools for colored children. The wisdom of the provision is no longer a matter of speculation. * * * But it will be said the classification now in question is one based on color, and so it is; but the color carries with it natural race peculiarities which furnish the reason for the classification. There are differences in races, and between individuals of the same race, not created by human laws, some of which can never be eradicated. These differences create different so-

> cial relations recognized by all well-organized governments. If we cast aside chimerical theories and look to practical results, it seems to us it must be conceded that separate schools for colored children is a regulation to their great advantage. * * *
>
> "The fact that the two races are separated for the purpose of receiving instruction deprives neither of any rights. It is but a reasonable regulation of the exercise of the right. As said in the case just cited 'equality and not identity of privileges and rights, is what is guaranteed to the citizen.' Our conclusion is, that the constitution and laws of this state providing for separate schools for colored children are not forbidden by or in conflict with the fourteenth amendment of the federal constitution."

It appears from the case of State ex rel. Stoutmeyer vs. Duffy, 7 Nev. 342, 8 Am. Rep. 713, that in the state of Nevada there was a statute which provided that

> "Negroes, Mongolians and Indians shall not be admitted into the public schools, but the board of trustees may establish a separate school for their education and use the public school funds for the support of same."

And the Court in passing upon the question said:

> "It is perfectly within their power (trustees) to send all blacks to one school, and all whites to another; or, without multiplying words, to make such a classification whether based on age, sex, race, or any other existent condition as may seem to them best."

This Court and a large number of state courts of last resort having upheld the right of the states to separate the

races in the schools, we are unable to see wherein the refusal of the school authorities to permit plaintiff in error to attend a particular white school has deprived her of any right, privilege, immunity, or property.

We have been unable to find a case exactly like the present one, but from all of the authorities we are convinced that it is within the discretion of the school authorities to classify pupils in any reasonable way so long as they provide a school of uniform character as to grades, etc., for all educable children within the school district. Therefore, plaintiff has no cause to complain in the present case, for it is not charged in the petition that a school was not available to her. Her only complaint being that she was not permitted to attend a particular school set apart for the education of white children alone, and that as a result she was deprived of the association of white children.

Were the school authorities within their rights in adopting the course which they did with reference to her education and association? Under the laws of the state of Mississippi plaintiff in error could never lawfully marry a member of the white race. On the other hand there is no law in the state prohibiting intermarriage between members of the Chinese and negro races. Is it not better to confine her association, so far as is possible, to those with whom she may associate on more intimate terms in the future years?

We respectfully submit that the judgment of the Supreme Court of the State of Mississippi should be upheld.

Respectfully submitted,

RUSH H. KNOX, Attorney General.

E. C. SHARP,

Of Counsel.

This is to certify that I have this day mailed to Messrs. Brewer, Brewer & McGehee, attorneys for plaintiff in error, at Clarksdale, Mississippi, a true and exact copy of the above and foregoing Brief.

This the 25th day of February, A. D., 1927.

E. C. SHARP.

SUPREME COURT OF THE UNITED STATES.

No. 29.—October Term, 1927.

Gong Lum and Chew How, next Friend for Martha Lum, Plaintiffs in Error, *vs.* G. P. Rice, L. C. Brown, Henry McGowan, et al.	In Error to the Supreme Court of the State of Mississippi.

[November 21, 1927.]

Mr. Chief Justice Taft delivered the opinion of the Court.

This was a petition for mandamus filed in the state Circuit Court of Mississippi for the First Judicial District of Bolivar County.

Gong Lum is a resident of Mississippi, resides in the Rosedale Consolidated High School District, and is the father of Martha Lum. He is engaged in the mercantile business. Neither he nor she was connected with the consular service or any other service of the government of China, or any other government, at the time of her birth. She was nine years old when the petition was filed, having been born January 21, 1915, and she sued by her next friend, Chew How, who is a native born citizen of the United States and the State of Mississippi. The petition alleged that she was of good moral character between the ages of five and twenty-one years, and that as she was such a citizen and an educable child it became her father's duty under the law to send her to school; that she desired to attend the Rosedale Consolidated High School; that at the opening of the school she appeared as a pupil, but at the noon recess she was notified by the superintendent that she would not be allowed to return to the school; that an order had been issued by the Board of Trustees, who are made defendants, excluding her from attending the school solely on the ground that she was of Chinese descent and not a member of the white or Caucasian race, and that their order had been made in pursuance to instructions from the State Superintendent of Education of Mississippi, who is also made a defendant.

The petitioners further show that there is no school maintained in the District for the education of children of Chinese descent and none established in Bolivar County where she could attend.

The Constitution of Mississippi requires that there shall be a county common school fund, made up of poll taxes from the various counties, to be retained in the counties where the same is collected, and a state common school fund to be taken from the general fund in the state treasury, which together shall be sufficient to maintain a common school for a term of four months in each scholastic year, but that any county or separate school district may levy an additional tax to maintain schools for a longer time than a term of four months, and that the said common school fund shall be distributed among the several counties and separate school districts in proportion to the number of educable children in each, to be collected from the data in the office of the State Superintendent of Education in the manner prescribed by law; that the legislature encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement, by the establishment of a uniform system of free public schools by taxation or otherwise, for all children between the ages of five and twenty-one years, and, as soon as practicable, establish schools of higher grade.

The petition alleged that, in obedience to this mandate of the Constitution, the legislature has provided for the establishment and for the payment of the expenses of the Rosedale Consolidated High School, and that the plaintiff, Gong Lum, the petitioner's father, is a taxpayer and helps to support and maintain the school; that Martha Lum is an educable child, is entitled to attend the school as a pupil, and that this is the only school conducted in the District available for her as a pupil; that the right to attend it is a valuable right; that she is not a member of the colored race nor is she of mixed blood, but that she is pure Chinese; that she is by the action of the Board of Trustees and the State Superintendent discriminated against directly and denied her right to be a member of the Rosedale School; that the school authorities have no discretion under the law as to her admission as a pupil in the school, but that they continue without authority of law to deny her the right to attend it as a pupil. For these reasons the writ of mandamus is prayed for against the defendants commanding them and each of them to desist from discriminating against her on account of her

race or ancestry and to give her the same rights and privileges that other educable children between the ages of five and twenty-one are granted in the Rosedale Consolidated High School.

The petition was demurred to by the defendants on the ground, among others, that the bill showed on its face that plaintiff is a member of the Mongolian or yellow race, and therefore not entitled to attend the schools provided by law in the State of Mississippi for children of the white or Caucasian race.

The trial court overruled the demurrer and ordered that a writ of mandamus issue to the defendants as prayed in the petition.

The defendants then appealed to the Supreme Court of Mississippi, which heard the case. *Rice* v. *Gong Lum,* 139 Miss. 760. In its opinion, it directed its attention to the proper construction of § 207 of the State Constitution of 1890, which provides:

"Separate schools shall be maintained for children of the white and colored races."

The Court held that this provision of the Constitution divided the educable children into those of the pure white or Caucasian race, on the one hand, and the brown, yellow and black races, on the other, and therefore that Martha Lum of the Mongolian or yellow race could not insist on being classed with the whites under this constitutional division. The Court said:

"The legislature is not compelled to provide separate schools for each of the colored races, and, unless and until it does provide such schools and provide for segregation of the other races, such races are entitled to have the benefit of the colored public schools. Under our statutes a colored public school exists in every county and in some convenient district in which every colored child is entitled to obtain an education. These schools are within the reach of all the children of the state, and the plaintiff does not show by her petition that she applied for admission to such schools. On the contrary the petitioner takes the position that because there are no separate public schools for Mongolians that she is entitled to enter the white public schools in preference to the colored public schools. A consolidated school in this state is simply a common school conducted as other common schools are conducted; the only distinction being that two or more school districts have been consolidated into one school. Such consolidation is entirely discretionary with the county school board having reference to the condition existing in the particular territory. Where a school district has an unusual amount of territory, with an unusual valuation of property therein, it may levy additional taxes. But the other common schools under similar statutes have the same power.

"If the plaintiff desires, she may attend the colored public schools of her district, or, if she does not so desire, she may go to a private school. The compulsory school law of this state does not require the attendance at a public school, and a parent under the decisions of the Supreme Court of the United States has a right to educate his child in a private school if he so desires. But plaintiff is not entitled to attend a white public school."

As we have seen, the plaintiffs aver that the Rosedale Consolidated High School is the only school conducted in that district available for Martha Lum as a pupil. They also aver that there is no school maintained in the district of Bolivar County for the education of Chinese children and none in the county. How are these averments to be reconciled with the statement of the State Supreme Court that colored schools are maintained in every county by virtue of the Constitution? This seems to be explained, in the language of the State Supreme Court, as follows:

"By statute it is provided that all the territory of each county of the state shall be divided into school districts separately for the white and colored races; that is to say, the whole territory it to be divided into white school districts, and then a new division of the county for colored school districts. In other words, the statutory scheme is to make the districts outside of the separate school districts, districts for the particular race, white or colored, so that the territorial limits of the school districts need not be the same, but the territory embraced in a school district for the colored race may not be the same territory embraced in the school district for the white race, and *vice versa*, which system of creating the common school districts for the two races, white and colored, do not require schools for each race as such to be maintained in each district, but each child, no matter from what territory, is assigned to some school district, the school buildings being separately located and separately controlled, but each having the same curriculum, and each having the same number of months of school term, if the attendance is maintained for the said statutory period, which school district of the common or public schools has certain privileges, among which is to maintain a public school by local taxation for a longer period of time than the said term of four months under named conditions which apply alike to the common schools for the white and colored races."

We must assume then that there are school districts for colored children in Bolivar County, but that no colored school is within the limits of the Rosedale Consolidated High School District. This is not inconsistent with there being, at a place outside of that district

and in a different district, a colored school which the plaintiff Martha Lum, may conveniently attend. If so, she is not denied, under the existing school system, the right to attend and enjoy the privileges of a common school education in a colored school. If it were otherwise, the petition should have contained an allegation showing it. Had the petition alleged specifically that there was no colored school in Martha Lum's neighborhood to which she could conveniently go, a different question would have been presented, and this, without regard to the State Supreme Court's construction of the State Constitution as limiting the white schools provided for the education of children of the white or Caucasian race. But we do not find the petition to present such a situation.

The case then reduces itself to the question whether a state can be said to afford to a child of Chinese ancestry born in this country, and a citizen of the United States, the equal protection of the laws by giving her the opportunity for a common school education in a school which receives only colored children of the brown, yellow or black races.

The right and power of the state to regulate the method of providing for the education of its youth at public expense is clear. In *Cumming* v. *Richmond County Board of Education*, 175 U. S. 528, 545, persons of color sued the Board of Education to enjoin it from maintaining a high school for white children without providing a similar school for colored children which had existed and had been discontinued. Mr. Justice Harlan, in delivering the opinion of the Court, said:

"Under the circumstances disclosed, we can not say that this action of the state court was, within the meaning of the Fourteenth Amendment, a denial by the State to the plaintiffs and to those associated with them of the equal protection of the laws or of any privileges belonging to them as citizens of the United States. We may add that while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective States, and any interference on the part of Federal authority with the management of such schools can not be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land."

The question here is whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed

among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow or black. Were this a new question, it would call for very full argument and consideration, but we think that it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts under the Federal Constitution. *Roberts* v. *City of Boston,* 5 Cush. (Mass.) 198, 206, 208, 209; *State ex rel. Garnes* v. *McCann,* 21 Ohio State 198, 210; *People ex rel. King* v. *Gallagher,* 93 N. Y. 438; *People ex rel. Cisco* v. *School Board,* 161 N. Y. 598; *Ward* v. *Flood,* 48 Cal. 36; *Wysinger* v. *Crookshank,* 82 Cal. 588, 590; *Reynolds* v. *Board of Education,* 66 Kans. 672; *McMillan* v. *School Committee,* 107 N. C. 609; *Cory* v. *Carter,* 48 Ind. 327; *Lehew* v. *Brummell,* 103 Mo. 546; *Dameron* v. *Bayless,* 14 Ariz. 180; *State ex rel. Stoutmeyer* v. *Duffy,* 7 Nev. 342, 348, 355; *Bertonneau* v. *Board,* 3 Woods, 177—s. c. 3 Fed. Cases, 294, Case No. 1,361; *United States* v. *Buntin,* 10 Fed. 730, 735; *Wong Him* v. *Callahan,* 119 Fed. 381.

In *Plessy* v. *Ferguson,* 163 U. S. 537, 544, 545, in upholding the validity under the Fourteenth Amendment of a statute of Louisiana requiring the separation of the white and colored races in railway coaches, a more difficult question than this, this Court, speaking of permitted race separation, said:

"The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced."

The case of *Roberts* v. *City of Boston, supra,* in which Chief Justice Shaw of the Supreme Judicial Court of Massachusetts, announced the opinion of that court upholding the separation of colored and white schools under a state constitutional injunction of equal protection, the same as the Fourteenth Amendment, was then referred to, and this Court continued:

"Similar laws have been enacted by Congress under its general power of legislation over the District of Columbia, Rev. Stat. D. C. §§ 281, 282, 283, 310, 319, as well as by the legislatures of many of the States, and have been generally, if not uniformly, sustained by the Courts",

citing many of the cases above named.

Most of the cases cited arose, it is true, over the establishment of separate schools as between white pupils and black pupils, but we can not think that the question is any different or that any different result can be reached, assuming the cases above cited to be rightly decided, where the issue is as between white pupils and the pupils of the yellow races. The decision is within the discretion of the state in regulating its public schools and does not conflict with the Fourteenth Amendment. The judgment of the Supreme Court of Mississippi is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.